

S P E E C H

OF

2

WILLIAM ADAM, Esq.

IN THE

HOUSE OF COMMONS,

MARCH 10th, 1794.

ON MOVING FOR THE

PRODUCTION OF CERTAIN RECORDS,

AND FOR

AN ADDRESS

TO

THE KING,

TO INTERPOSE

THE ROYAL JUSTICE AND CLEMENCY,

IN BEHALF OF

Thomas Muir, Esq. and the Rev. Thomas Fyshe Palmer,

L O N D O N :

PRINTED FOR J. DEBRETT,

OPPOSITE BURLINGTON HOUSE, PICCADILLY.

1794.

WILLIAM ADAM, Esq.

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ROBERTSON, CLARENCE RECORDS



THE ROYAL JUSTICE AND CLERK

MOCHOS

1910-1911

P R E F A C E.

IN the last session of parliament, within a few days after the House of Lords had, finally, decided that no appeal was competent from the Court of Justiciary; Mr. Adam gave notice of his intention to propose, early in this session, some alterations in the criminal law of Scotland, particularly an appeal from the Court of Justiciary in matters of law. Accordingly on the 27th of January last, five days after the meeting of parliament in the present session, he intimated to the House that he would, upon the 4th of February, move for a bill to grant such an appeal. He stated at the same time, that the cases of Mr. Muir and Mr. Palmer (which were unforeseen at the period of his original notice) would lead him, in some measure, to enlarge his plan by moving, if the bill was received, for an instruction to the committee on the bill, to insert a clause that should have a retrospect to all cases in which the Court of Justiciary had pronounced judgements, in the year 1793; thereby rendering it compe-

tent for Mr. Muir and Mr. Palmer to appeal for error in law.

On the 4th of February, Mr. Adam made his motion, "for leave to bring in a bill, to grant an appeal to the Lords in Parliament, from the Court of Justiciary in Scotland, **IN MATTER OF LAW,**" which was rejected in the first instance. Thus the possibility of carrying the questions of law, which arose in these cases, before a judicial tribunal was precluded. Mr. Adam therefore gave notice, that he would bring forward the motions with which this speech concludes on the 24th day of February.

Owing to Mr. Pitt desiring some days to consider, whether or not he would agree to Mr. Adam's preparatory motions, for certain parts of the records; * owing to the presenting of Mr. Palmer's petition to the House of Commons, and the adjournment of the debate, on that subject, moved by Mr. Pitt; and lastly, owing to the indisposition of Mr. Secretary Dundas, Mr. Adam was prevented from opening the business till the 10th of March.

BY a sentence of the Court of Justiciary at Edinburgh, on the 31st of August last, Mr. Muir was adjudged to transportation for *fourteen* years, and by a sentence of the circuit court at Perth, on the 13th of September last, Mr. Palmer was adjudged to transportation for *seven* years, and Botany Bay was understood,

* Vide the Parliamentary Register of this session, by Debrett.

at the time the sentences were passed, to be the place to which they would be transported.

It is hardly necessary to observe, that the punishment of transportation cannot be inflicted, by the law of England for a misdemeanor. But it is necessary to remark, that these are the first instances in which transportation has been imposed by the Court of Justiciary in Scotland, for an offence of that nature.

The subject of these judgments has at length, after repeated discussions, been thoroughly investigated; and after a laborious search into the judicial records of Scotland, a case from the register of the Scots privy council in 1704* has been relied on by their defenders.

A person of the name of *Bailey* appears, by that case, to have been sentenced to transportation; and it is alledged that the offence with which he was charged, was what the law of Scotland terms *Leasing-making*, which is a misdemeanor analogous to public libel. It was produced to prove, that transportation was inflicted for the offence of *Leasing-making*, within a year after passing the act of 1703, † (chap. 4.) which regulates and restricts the punishment of *Leasing-making* to fine, imprisonment, or *banishment*; and therefore that the term *banishment* in that statute must have been understood to imply the power of punishing the offence of *Leasing-making*, or public libel, with transportation.

A very few observations will serve to shew that this solitary precedent is of no weight.

* This case, it is to be observed, was not discovered till within a week of Mr. Adam's Motion in the House of Commons.

† Vide Appendix.

FIRST, The judgments of the Scots Privy Council have, at all times, been considered as tyrannical and illegal, and as being of no authority in point of law. That court was an exact counterpart of the *Star Chamber*; and was at last abolished by an act of the first parliament of Great Britain in the year 1707 (within two years after the judgment relied on) and one of the avowed and principal motives for its abolition, was its oppression, and danger to the liberty of the subject.*

In the next place, the offences for which Bailey was brought to trial, were not laid upon the statutes of *Leafing-making* alone; but he was charged, likewise, with other crimes, some of which inferred the pain of death: and the punishments prayed for, and which the court found relevant, were *either* those prescribed by the act of 1703, *or* such other punishment as the court should think fit. The court (in which the Lord Advocate who prosecuted Bailey appears to have acted as a Judge) did pronounce the sentence of *pillory* as well as transportation, yet the punishment of pillory is not included in, but, on the contrary, is prohibited by the general words and spirit of the statute of 1703. Therefore the Privy Council must be held, either to have delivered their judgment upon the idea of that court possessing an *arbitrary will* superior to all law, or as having considered Bailey's crimes to fall under those allegations in the indictment, which are not comprehended in the statute of 1703. So that the only case to be discovered on the subject is no authority for

* De Foe's History of the Union, page 594.

construing the statute, and does not in any respect prove, that the term *banishment* implies *transportation*.

It is to be observed farther, that Bailey never was transported, but was released from confinement in consequence of an act of the parliament of Scotland, passed upon his petition.

It was likewise argued, in support of these judgments, from other decisions of the Scots law, that, wherever the statutes had given the power of *banishing*, the Courts of Justiciary might inflict the punishment of *transportation*; and it was maintained, that this doctrine was established by the mode of pronouncing judgment under an act of the Scots parliament, passed in 1696,* which enacts, that fraudulent bankrupts may be punished with *banishment*, OR OTHERWISE (*death excepted.*)

Independent of the strong argument which the words of the act afford against the conclusion contended for, it is to be observed, that those who heard this statement were led to believe, from the generality of it—*First*, that transportation under the statute of 1696, was a common and frequent judgment—*Secondly*, that it was contemporary with the statute, and explained the meaning of the legislature, at or near the time of passing the act—*Thirdly*, that it was a case within the usual jurisdiction of the Court of Justiciary.

Now, *in the first place*, it has not been a common or frequent judgment; for the utmost industry has not been able to discover more than three such instances on record,

* Chapter 5. Vide Appendix.

In the second place, it affords no contemporaneous explanation of the sense in which the term banishment was used by the legislature in 1696; for the earliest case that appears of a bankrupt adjudged to transportation, is more than 50 years after that period, viz. on the 26th of July 1748.

In the third place, the jurisdiction respecting fraudulent bankrupts is not in the Court of Justiciary, but in the Court of Session.

This last-mentioned court has jurisdiction in forgery and perjury, as well as in fraudulent bankruptcy. The Scots statutes respecting forgery and perjury do not authorize the punishment of banishment for those offences: yet the Court of Session has been in the practice of punishing them with transportation. In doing so, it is evident that the court could not act under the authority of statute, but must have pronounced the judgment of transportation, in consequence of some power supposed to be inherent in the court, by virtue of its constitution. That power is known by the name of the *nobile officium*; consequently the pronouncing judgment of transportation against fraudulent bankrupts can be accounted for, without having recourse to a forced construction of the act of parliament.

Such are the cases, from the practice of the Privy Council, or of the Court of Session, which have been relied on in this argument, and it is always to be remembered, *that from the records of the Court of Justiciary itself*, no case has been attempted to be cited, in support of the late judgments.



MR.

MR. ADAM'S

SPEECH

IN THE

HOUSE OF COMMONS, &c.

MR. SPEAKER,

I RISE, after a variety of delays, to lay before this House the judicial proceedings of the supreme court of criminal judicature in the northern part of the united kingdom, in the cases of Mr. Muir and Mr. Palmer.

The various circumstances which have, till now, prevented my bringing this subject before you, were not created by me; they are in the knowledge of the House; and I forbear to waste your time by dwelling upon them.

In some preliminary discussions respecting this business, I said, when a Right Honourable Gentleman,* opposite to me, asserted that the sentences of the Court of Justiciary, to which I have referred, were *legal*, and that the discretion which the court had exercised was *sound*;

* Mr. Pitt.

that I would not then make any declaration respecting them. Not but that the measure which I had ~~announc-~~ed, implied a doubt as to both; but I thought it was not the part of a good subject to make general declarations respecting the conduct of a Court of Justice, till I could be heard at length, to support my allegations with argument. That time is now come, and that duty is now to be performed. It is an arduous task, and, in the discharge of it, I feel my mind strongly impressed with the opposite sensations of confidence and anxiety. Confidence in the goodness of my cause; anxiety as to my capacity to do it justice. It is a subject at once grave, important, interesting, and difficult. It is *grave*, in so far as it questions the legal judgment and sound discretion of a Court of Justice. It is *important*, as it relates to the administration of criminal jurisprudence in immediate connexion with the liberty of the subject, and the freedom of the constitution; it is *interesting*, with reference to the individuals, who are to suffer under the severity of the sentence; and it is *difficult*, because it is a legal subject, relating to Scotland, addressed to a popular assembly, and not to a court of justice.

Under these impressions, however, there are some circumstances to give me comfort. It is not my fault that I am here. The decisions of the supreme appellate court* have established, that from the judiciary and circuit courts in Scotland, both of which are supreme courts, (for the circuit courts there are not under special commissions as here) there is no appeal. I endea-

* The House of Lords.

voured to remedy that defect by proposing an act to give an appeal from the criminal courts of Scotland,* and I meant that it should contain a retrospective clause which would have included these cases. But a majority of this House thought proper to reject my motion; and I am now under the necessity of discussing the legal part of this question in this place, because this is the only place in which it can be discussed. Under such necessity, whether I look round me, or whether I look to the benches opposite to me, there are circumstances to comfort me under the impressions which I feel. Around me there are Gentlemen whose constitutional knowledge, whose powerful talents and discerning minds enable them to embrace and understand the subject; and there are those, whose great experience in the profession of the Law of this Country, give them a ready apprehension of legal questions, though arising out of the criminal law of another Country. Over against me I see a Right Honourable Gentleman,† who, though now one of his Majesty's ministers, was originally educated to the profession of the Bar, and who to early habits of legal study adds considerable parliamentary experience, who possesses great and undisputed talents, and who having repeatedly declared his opinion upon the legality and sound discretion of these sentences, must have sifted the question to the bottom; and I doubt not he will take a part in this discussion. I have the satisfaction to see another Right Hon. Gentleman,‡ whose illness was one

* Mr. Adam's motion on the 2d Feb. 1794.

† Mr. Pitt.

‡ Mr. Secretary Dundas.

cause for postponing this business till now. I hope he will not fail to take a part in this debate; for though I have every thing to fear from my own defects, my subject fears no opponent. That Gentleman to long parliamentary experience adds the education and practice of a Scots Lawyer, particularly in the Criminal Courts, where, as Solicitor General or Advocate, he served the crown, almost, from the hour he was called to that Bar.

Sir, I see another Gentleman, whose presence we have procured by our last delay, a circumstance, which is likewise consolatory to me; for here again I court full discussion. I mean the learned* Person who instituted and conducted these prosecutions, and who of course, must have given his whole mind to this important subject. Sir, I see other Gentlemen of great rank, knowledge, and estimation in the law of this country, and some who may, from their habits and practice in the court of appeal from Scotland, be said to be *Docti Utriusque Juris*. To all these Gentlemen I particularly address myself; and in the arduous task which I have to discharge, I have much satisfaction in beholding such an audience.

Sir, I have no pretensions whatever to practical knowledge of the law of Scotland, but I have some pretensions to sedulous, laborious, and anxious attention to whatever my duty in this House calls upon me to consider. I have viewed this extensive and difficult subject on every side: according to the expressive language and

* Lord Advocate Dundas.

sound precept of Lord Bacon—"not to contradict and
 "confute, not to believe or take for granted, not to
 "find talk or discourse, but to weigh and consider."
 Sir, I have *weighed* and *considered* the subject in all its
 aspects, and in all its parts, not only with a view to
 form a sound opinion, which in such a case I was bound
 to do, before I ventured to challenge judicial supreme
 authority, but with a view to frame the motions which
 I shall have occasion to offer to the House.

I mean first to move for certain parts of the record,
 and certain notes of *memoranda* or the evidence,
 which, if before the House, will fairly raise the whole
 question. The *first* motion will be for the indictment,
 the plea, the verdict, and the judgment, which will
 raise the question of legality. The *second* motion will
 be for certain determinations of the Court, respecting
 the admitting and rejecting of evidence. The *third* will
 be for certain proceedings which took place respecting
 the admission of objectionable persons to serve upon
 the jury. The *fourth* will relate to the commitment of
 a person of the name of William Muir for refusing,
 upon a religious scruple, to take the oath. The *fifth*
 motion relates to the conduct of the court with respect
 to one John Ruffel, a witness for the defendant, whose
 evidence was refused, and he himself committed for pre-
 varication, without being examined. All these things
 appear upon the face of the record, except the *second*,
 and I have, here in my possession, an office copy of
 the record to prove my assertion. The last can be sup-
 plied by the notes of the Judges, in the manner in
 use,

use, in cases where the notes of the Judge is the only evidence of what passes at a trial.

Of these, the first motion is common to the case of Mr. Palmer, as well as that of Mr. Muir; the others are special circumstances which belong to the case of Mr. Muir only. If these should be granted, it is my intention to found on them two addresses to his Majesty, applicable to the cases of those unfortunate Gentlemen. If they are not granted, I shall think it equally my duty to move the addresses, because I am entitled to assume these things as true, unless the contrary is shewn by a production of the record and evidence.

The addresses will state respectfully, as far as concerns the court, that there are doubts in regard to the legality of the sentences; that there is an excess in the exercise of judicial discretion, in both cases; that there are in Mr. Muir's case specialities, which go to shew a *mis-trial*, by an improper admission of jurymen, and an improper admission and rejection of evidence; and they will conclude with a prayer to his majesty, to extend his justice and mercy to both these persons; so that "The monarch," according to the elegant and constitutional sentiment of Sir William Blackstone, "may appear in those works only, in which the nation is accustomed to see him, works of legislature and mercy, that the people may look up to him as the fountain of nothing but bounty and grace. Which acts of goodness frequently repeated, and coming immediately from his own hand, endear the sovereign to his subjects, and contribute more than any thing to root in their hearts, that filial affection and
" personal

“ personal loyalty, which are the sure establishment of
“ a prince.”

In the course of what I have to offer to the House, though I may sometimes be led to illustrate the subject by analogies from the law of England, I shall certainly found my right to prevail in what I propose, upon the law of Scotland alone, because, by that law alone, the legality, justice, and discretion of the sentences in question are to be judged. In doing this, I shall to the utmost of my power avoid discussions purely technical, not because technical accuracy does not secure substantial justice; for upon that subject I never can forget the wise and powerful sentiment of an eminent judicial character, whose unremitting, intelligent, impartial, and gratuitous administration of justice, in appeals, in the other House of Parliament, Scotland will continue to feel with endless gratitude. That great and enlightened person* is reported to have said, “ THE FORMS OF LAW ARE THE FENCES OF JUSTICE.” As such they are doubtless to be considered, and as such I must call them to my aid; but I will call them in aid sparingly; because too strong a leaning to that sort of argument might be misplaced in addressing a numerous and popular tribunal like this House; and the object which I wish to attain, may be accomplished without pressing upon that part of the subject to an excessive degree.

The question which I bring forward has nothing abstract in it. It is a great practical question, upon a

* Lord Thurlow.

most important judicial decision. The first consideration being the legality of the sentences, my opinion with respect to that legality, I shall endeavour to make out, by maintaining the three following propositions:

FIRST, That the crimes set forth in the indictments against Thomas Muir, and Thomas Fyshe Palmer, are what the law of Scotland terms *Leasing-making*, which, by the English law, is a misdemeanor, in the nature of a public libel, tending to affect the State; and the indictments charge no other offence whatever.

SECOND, "That the punishment of *transportation* cannot by the law of Scotland be legally inflicted for the crime of *Leasing-making* or *Public Libel*. The Scots act of Queen Ann, (1703, c. 4.) having appropriated to that crime the punishment of fine, imprisonment, or *banishment*; under which pain of *banishment*, *transportation* is not included."

"And that the annexing the *pain* of *death* to the return from such *transportation* is an aggravation not warranted by law; the punishment of death being expressly taken away by the statute of 1703, c. 4. and no statute has passed since that time, which varies or alters that law."

THIRD, "That if the acts charged in the indictments do not constitute the crime of *Leasing-making*, or *Public Libel*, the indictments charge no crime known to the law of Scotland;

First,

First, because there is no such crime known to the law of Scotland, at common law, as *sedition* constituting a distinct and separate offence: and these offences do not fall within the statutory Seditions.

Secondly, because if there is such a crime at common law, these indictments do not charge it, and it would be contrary to law to punish that offence by *transportation*; and not warranted by law to inflict the pain of *death* for returning from such transportation.

To explain the first of these propositions, it may be necessary to state, that a Scots indictment professes to be a perfect Syllogism: the first or major proposition sets forth the crime; the minor proposition asserts the facts with time and place, which the accused is charged with having committed; the conclusion drawn is, that he is guilty of the crime charged. Here this material observation arises, that however wide the range of the major proposition may be, the matter charged in the minor proposition must be understood to restrict it, upon this sound principle of law and common sense, that a person cannot be found guilty of more than he is charged to have done; and that what he is supposed to have done, is contained in the minor proposition. There is another observation equally material, viz. That as the major proposition contains the statement of the crime, so the facts set forth in the minor proposition, must be such as to constitute the crime set forth in the major proposition, and no other; and above all, that the minor proposition cannot legally contain facts, establishing a higher crime than that set forth in the major proposition. Under these observations I contend, that the indictment against Mr. Muir

contains no charge but that of *Leasing-making*, or *Public Libel against the state*.

In reading the indictment, the House will perceive, that I read from the printed trial. But I am not only sure of its accuracy by having compared it with the office copy of the record, which I have here before me, but I may observe, now, once for all, that there were three accounts of the trial of Mr. Muir published; that which I shall quote from, is the trial published by Mr. Creech, which, from the motto on its title page, and from the introduction, is evidently meant to bear against the prisoner, and to be partial to that side, which has not mercy for its object.

The indictment sets forth in the major proposition, "That it is criminal to excite disloyalty by seditious speeches and harangues; MORE ESPECIALLY when such speeches and harangues are addressed to meetings and convocations brought together by no lawful authority, and uttered by one, who is the chief instrument of calling together such meetings." What is stated in the first part of this proposition is nothing more than *Leasing-making*; namely, the speaking words tending to excite discord between the king and his people. The other part of the proposition, that is, the doing so before unlawful convocations, in calling of which unlawful convocations the person haranguing was the chief instrument, is mere matter of aggravation. First, it is so laid in the indictment, for it is introduced under words of aggravation; next, it is the proper form and mode of pleading such matter, and is laid down to be so in the law authorities of Scotland; and lastly, it is so

so held to be, by the Lord Justice Clerk in delivering judgment, in this case, upon the relevancy of the indictment. As to the first, it requires no argument to prove, that the words in the indictment, (*MORE ESPECIALLY*) which apply to all the clause that relates to convoking the people, are words of mere aggravation, and not of substantive charge. As to the second, it is established upon the authority of Sir George Mackenzie, to be the rule of pleading, to lay the crime of convocation as aggravating matter only.

Sir GEORGE MACKENZIE is an Author to whom I shall have frequent occasion to refer. He may be said to be almost the only authority, as a *text writer*, on the criminal law of Scotland: he was a man of considerable talents and great acquirements; and his works are both various and eminent. But his object was to raise himself by the patronage of the Duke of Lauderdale, and those persons who governed Scotland during the disgraceful reign of Charles II. a period which stains the purity of public justice and national honour. He was a tool of the worst of ministers, and the apologist of all the unconstitutional acts of that unhappy æra; yet, both as a lawyer and an historian, I must rely upon him as supporting the case which I undertake to prove. And it will not be denied, that when I quote Sir George Mackenzie, I quote an authority constantly cited in the Scots criminal courts. Such an author may with propriety be stiled an unwilling witness in such a cause as I have to bring before you. But if he proves my case, like

every case proved by an unwilling witness, the cause receives additional strength, the argument additional confirmation.

Upon the subject of convocating the people, Sir George Mackenzie, in his title Sedition, says, "The crime of simple convocation is ordinarily pursued before the council, and is seldom punished either by the council or justice court, as *crimen per se*, but as the "agreging* quality of a riot, or other crime."† So that the nature and quality of the act of convocation is by law matter of aggravation; and of course, is properly laid in the major proposition of the indictment, under words of aggravation.

The latter part of the major proposition, which sets forth the circulating seditious writings, or reading them aloud to meetings, does not charge the convocating those meetings, either as a substantive fact, or as aggravating matter; therefore, on that part of the proposition, it is impossible for the defenders of the judgment to rely.

Taking the case then on the major proposition alone, I deny that there is any thing there stated, which raises the crime above *Leasing-making* or *Public Libel*. Let us see next, how it stands under the minor proposition.

The minor proposition sets forth, that Thomas Muir did at certain times, and in certain places, in *societies of Reform, which societies he was the chief means of instituting and forming, harangue such meetings, propagate certain Doctrines, &c. &c.*

* Agreging means aggravating.

† Criminals, p. 1. t. 7. l. 3.

Here the act of convocation, or assembling the people, is not charged either as a substantive crime, or as aggravation; but he is, merely, charged as being a chief means of instituting the societies of reform; which cannot mean the calling them together for the particular criminal purpose charged in the indictment; but as being a person who instituted or gave birth to the societies for the general purposes of reform. So that even if the major proposition alledged another crime than *Leasing-making*, and that the aggravating matter could be changed into a direct allegation of sedition, the minor proposition has restricted it by not alledging it at all; for the saying *he instituted the society* can never be held to mean, that *he convoked the people*.

But observe, lastly, what the Court says upon it, in pronouncing on the relevancy of the libel;* a proceeding which always takes place in Scotland previous to the trial of the accused.

The Lord Justice Clerk says, “ the crime with which “ the *Indictment* charges the *pannel* is—*that of exciting “ discontent among the people;—of endeavouring to create “ a Rebellion;—of feloniously disseminating wicked and seditious publications, and advising their perusal.*”

There are in this Judgment three clauses; the first and third cannot be construed to rise an Iota higher than *Leasing-making*. The *exciting discontent* and *disseminating seditious publications* are precisely and accurately the crime of libel affecting the government of the country. The second or middle clause is of a

* Creech's Trial, p. 31.

different nature, *the endeavouring to create a Rebellion.* Now I contend that ~~that~~ crime does not stand charged on the face of the indictment, and that from the very nature of the thing it cannot. There is no charge in the indictment of a conspiracy to excite sedition, or raise insurrections. There is no charge of individual acts to incite insurrection. There is therefore no misdemeanor alledged, which can by any construction be brought within the second clause of the judgment, even if rebellion could be construed to mean no more than an insurrection, or a seditious commotion. But what is rebellion? it is treason; what is the endeavour to excite it, if committed? it is the crime of accessory to treason. The treason laws of England are extended to Scotland, and by that law there is no accessory in treason, all are principals: therefore the indictment must charge the crime of treason, which is not pretended, or the middle clause of the judgment of the Lord Justice Clerk falls to the ground. The relevancy of the libel therefore rests on the first and third proposition *exciting discontent, and disseminating seditious works*, which are mere *Leasing-making*. I am therefore entitled to conclude that I have the judgment of the court with my construction of what the indictment charges; and I am, upon clear principles of law, entitled to say, in the terms of my first proposition, "That the crime set forth in the indictment against Mr. Muir, is *Leasing-making*, and that the indictment charges no other crime whatever."

As to the indictment against Mr. Palmer, the same argument applies, with this material additional observation,

vation, that in that indictment not one word is stated respecting a convocation of the people ; but the simple act of publishing what is termed a seditious libel, is there charged ; consequently the case, which is clear with respect to Mr. Muir, must remain without a doubt in the instance of Mr. Palmer.

It being established, therefore, by these arguments, that the crime charged against these gentlemen is *Leasing-making* only, it remains to be shewn, according to my second proposition ;

“ That the punishment of *transportation* cannot, by
 “ the law of Scotland, be legally inflicted on that
 “ crime ; the statute of 1703, chap. 4. having enacted
 “ the punishment of *banishment*, in which *transportation*
 “ is not included ; and that the annexing the pain of
 “ *death* on return, is an aggravation not warranted by
 “ law ; the punishment of death being taken away by
 “ the statute of 1703 ; and no law having passed since
 “ that time to vary or alter the enactment of that
 “ statute.”

In order to understand the argument upon this proposition, it is necessary to enter into the origin and history of the act of 1703, respecting *Leasing-making*. The history of any act of parliament is an ordinary and legal clue by which to unravel its meaning ; but it is peculiarly calculated to explain the construction of acts which relate to the state and government, and most particularly suited to expound this statute, which is the Master key that unlocks and discovers this repository of doubtful legality and unprecedented severity.

The act of 1703, chap. 4. derives its origin directly from that charter of liberty which passed in Scotland at
 the

the period of the Revolution, termed the CLAIM OF RIGHT, and which corresponds to the bill of rights in this country.

Sir, it is impossible to allude to that period of Scots history, without paying a due tribute of praise to those who led the way in that great event. They did not spend their time in metaphysical disquisitions upon the abdication of the crown, but at once decided, in the phraseology of that country, that it was *forefaulted*.

The oppression of individuals and the infringements of liberty, which preceded the Revolution in England, likewise preceded that event in Scotland. If England had her Sidney and Russell, Scotland had her Earl of Argyle. The history of that extraordinary personage is so well known, that it were almost unnecessary to enlarge upon it, did it not mark the origin of a most important clause in the claim of right, from which I will shew the act of 1703, to be derived.

The Earl of Argyle, in the year 1681, or 1682, was tried for *Leasing-making*, because he had given a conscientious explanation of an unconscientious Test, attempted to be imposed upon the people of Scotland, by the tyrannical government of the Duke of York in the reign of Charles the Second. Mr. Hume, in describing the injustice and illegality of that trial, says, "It is needless to enter into particulars, where the iniquity is so apparent. Though the sword of Justice was displayed, even her semblance was not put on, and the forms alone of law were preserved, in order to sanctify, or rather aggravate, the oppression." The Earl was found guilty by a jury of his peers, and sentenced to death by the Court; but he made his escape

escape from prison. He returned afterwards to Scotland in the reign of James the Second, and was (to fill the measure of judicial iniquity) executed upon the old sentence of 1681. But when the period of the Revolution arrived, those who accomplished that great event were anxious to prevent a repetition of such aggravated and enormous oppression. They inserted it as a clause in the claim of right, "*That the causing pursue and forfeit persons upon STRETCHES of old and obsolete laws, upon frivolous and weak pretences, upon lame and defective probations, as particularly the late Earl of Argyle, are contrary to law.*" This short but expressive and important clause was considered as a security, and did for some time operate as a security, against the oppression of the crown through the medium of criminal prosecutions; but the state of Scotland soon changed. An attempt was made by the Scots to establish a colony on the isthmus of Darien; which was strongly resisted by the ministers of the crown. The eagerness and zeal of the people of Scotland, in support of this favourite measure, led to many acts and publications reflecting on the government and the parliament. A trial took place* in 1701, in which doctrines subversive of liberty and justice were held by the crown lawyers. The obsolete laws condemned in the claim of right, in the case of the Earl of Argyle, were attempted to be revived, the effect of which was, indeed, prevented in the particular instance, by the jury, who had the good sense and spirit to acquit the ac-

* Arnot's Criminal Trials, page 91. The case of Achmouty and Thomson.

eused persons : but those, who loved their country,
 felt the danger, and saw with alarm, a most material
 article of their liberties directly aimed at. That
 illustrious Scots patriot, Fletcher of Salton, who
 had returned from Banishment and persecution, was
 daily engaged in defending the liberties of his Country
 in Parliament, and it is hardly probable that such an
 attack upon them as this, could have escaped his vigi-
 lance. It is material to observe, too, that the parlia-
 ment of Scotland, on the same day that the act con-
 cerning *Leasing-making* passed, had the claim of right
 immediately under its consideration. This fact is
 proved from the collection of the Scots acts of parlia-
 ment, by which it appears, that the statute which im-
 mediately precedes the act concerning *Leasing-making*,
 is an act making it high treason to alter or innovate the
 claim of right, or any article thereof.* Then follows
 the act concerning *Leasing-making*, in these words,
 “Whereas the said laws have been liable to
 “STRETCHES, and that in respect of their gene-
 “rality and the various constructions they may admit,
 “they may be, as to the afore said capital punishment,
 “of dangerous consequence; her Majesty, with the
 “advice of the Estates, &c. doth therefore abrogate in
 “all time coming the sanction and pain of death and
 “confiscation, and ordains that the punishment of the
 “crimes therein mentioned shall hereafter be arbitrary,
 “that is, by fining, imprisonment, and BANISH-
 “MENT. But if the party be poor and not able to

* See Appendix.

“ pay a fine, then to be punished in his body, life
“ and limb always preserved.”

The origin and nature of this act then is clear and indisputable. By the evident history of the times, namely, The oppressive and unconstitutional doctrines contended for in the crown prosecutions of that period, the zeal of the people in the Darien cause, and the contemporaneous consideration of the *claim of right* as well as the similarity of the language of the two statutes, the act of 1703, chap. 4. appears to derive its descent, lineally, from that important clause of the claim of rights, which took its rise in the trial of the Earl of Argyle.

The two characters which it bears—Its character as a penal law, and its character as a law of privilege, connected with the liberty of the subject, unite to enforce the same construction. As a penal law, every word is to be construed strictly, upon that important principle of criminal jurisprudence, the safety of the accused. As derived from and connected with the claim of right, it is to receive an interpretation favourable to the privileges of the people; which requires, that in its construction it should be limited to the strict sense and meaning of the words, for the privilege of the subject, under this statute, is the limitation and restriction of punishment.

There is another observation of material consequence, in the consideration of this act. It leaves the offences exactly as they stood by the former statutes, but it alters the punishment by mitigating its severity. It is therefore to be construed in such a manner, as will

give full effect to that spirit of lenity and mitigation, and of two doubtful interpretations that is always to be preferred by which severity is abridged.

Under these observations, let me now consider what the word *banishment* means, in general, what it means by the law of Scotland, and what it particularly means in the act of 1703, chap. 4. That it does not mean *transportation* (the punishment inflicted in the cases under consideration) I pledge myself to prove by every species of evidence by which any position of law can be ascertained; from the lowest circumstance of proof, the common acceptance of the word in common language, to the very highest—THE LANGUAGE OF THE LEGISLATURE IN ACTS OF PARLIAMENT.

It is necessary here to make a preliminary observation, namely, That there is now, and was formerly, great inaccuracy and want of precision in the use of words in Scotland, even in the courts of law, consequently it may appear in some instances, from the mode of using the words *banishment* and *transportation*, both in the statutes and the cases, that it is doubtful which is meant; it is therefore not the word taken abstractedly, or by itself, by which we are to construe its meaning, but it is to be construed by the context and relation in which it stands.

By *banishment* I mean mere expulsion from the society, country, or realm, to which the expelled person belongs; leaving every other country open to his approach, without restraint.

*Round the wide World in BANISHMENT we roam,
Forced from our fertile fields and native Home.**

By *transportation* I mean not only the expulsion of the person transported from the realm or society to which he belongs, but his being sent to another place, which he cannot quit, and in which he must remain, in a situation of servitude, as in America formerly; or under a military despotism and servitude, as at Botany Bay now.† The one is simple expatriation with the power of going any where, but deprived of the power of returning home. The other is expatriation with the aggravation of being sent to a stated place in a situation of servitude and confinement in that place. This distinction, Sir, I beg may be kept in mind, because in the decided cases of the Scots courts, and in the acts of the Scots parliament, it will appear, that the words *Banished to the Plantations*, *Banished to the West-Indies*, *Banished to America*, are frequently used; but though the word banished is used, yet I admit that, where it stands conjoined with the place of transportation, the

* Dryden.

† In Governor Philip's Instructions to Mr. King, Commandant of Norfolk Island, page 73 and 74, it is said, "the convicts being the servants of the crown, till the time for which they are sentenced is expired, their labour is to be for the public.

"You are not to permit any intercourse, or trade, with any ships or vessels that may stop at the island, whether English or of any other nation, unless such ships or vessels should be in distress." Vide also the act of 27 George III. chap. 2. establishing martial law as the law of the settlement.

thing done is what is understood now in Scotland, and has been always understood in this country, to be transportation.

It will not be supposed, I am sure, by any person who knows the history of these punishments, that there is any thing theoretical in this doctrine; it is one which is to be found both in the Roman law, and in the law of this country. In the Roman law, there were three distinctions; the *aquæ et ignis interdictio*; the *relegatio*; and the *deportatio in insulam*. The first was perpetual banishment, without restriction as to place, but expatriation from Rome for life; the second, *relegatio*, was banishment, to a place appointed, without servitude; the third, *deportatio in insulam*, precisely answers to transportation, as it is now understood in England.

In England, banishment seems to have been a punishment unknown to the common law, yet the term is used by Lord Coke,* and abjuration of the realm for felony is in the nature of *banishment*. The expression is used, likewise, in a statute of the 39th Eliz. whereby certain vagrants are enacted to be banished. But although it does not exist in this country, as a punishment in the ordinary course of criminal justice, it is to be found in bills of pains and penalties, as in the cases of Lord Clarendon and the Bishop of Rochester. In all these cases it has a distinct meaning, and is clearly a distinct and different punishment from *transportation*; so that the essential distinction, for which I contend, between the punishment of simple banishment, and the

* 2d Institute, 201.

aggravated banishment of transportation, which has confinement to a place, servitude, and other circumstances of increased severity, superadded, is recognized in established systems of law.

I shall presently shew in what manner this distinction arose in the law of Scotland, from which it will clearly appear, that according to the sound exposition of the statute of 1703, chap. 4. the word banishment, as used in that statute, means *simple expatriation from Scotland*, and nothing more.

In order that I may render this evident, it is necessary to state shortly, the history of the punishment of transportation, as connected with the history of the country and of its law.

During the early periods of the Scots government, it is impossible that there should have been any such punishment as transportation. For transportation infers the existence of some place, territory, or colony, under the dominion and authority of the governing power, and out of the mother country, to which a criminal can be sent, as to a situation of servitude and confinement. Now the condition of Scotland admitted of no such thing, until the end of the last, and beginning of the present century, when the Darien colony was set on foot; for it will not be said, that the settlement of the Scots in the province of Ulster, in Ireland, after the accession of James the First to the throne of England, afforded the means of transportation. The authority of a court cannot exceed the bounds of its jurisdiction; therefore, there can be no transportation by the authority of the court, because its
juris-

jurisdiction is restricted to the bounds of the realm. To constitute the punishment of transportation, there must either be an act of the legislature (as I shall shew by and bye, was the case in England) or an usage of the courts, and an acquiescence of the legislature; which I shall shew immediately to have been the case in Scotland.

If this doctrine required to be proved, or illustrated, it is only necessary to refer to a very recent case, which arose upon the Sheriff of a Scots county, inflicting the sentence of *transportation*.

When a Right Honourable Gentleman over against me* was Solicitor General for Scotland, a prosecution was instituted before the sheriff of the county of Haddington, for theft, Sheriffs in Scotland having jurisdiction in capital cases. The prisoner was found guilty, and the sentence pronounced by the sheriff was transportation. The matter was carried before the Court of Justiciary by the convict, there being an appeal from the sheriff's court to the court of justiciary. It was argued by the Right Honourable Gentleman as counsel for the crown, in favour of the sheriff's power to transport. It was argued for the convict by Mr. Blair, the present Solicitor General for Scotland. The Court of Justiciary decided in favour of the convict, and held that the sheriff could not inflict the sentence of transportation, because his county limited his jurisdiction. It then adjudged, that the sentence of transportation must be reversed; but inasmuch as the party had been found guilty, by the verdict of a Jury, the Court of Justiciary sentenced

* Secretary Dundas.

him to be *banished*.* This case, then, establishes two material points; first, it shews, that transportation is limited by jurisdiction, so that in the original state of Scotland, there could be no transportation: next, it proves the distinction which I contend for between transportation and banishment; they prevent the sentence of transportation from being executed, and they inflict that of banishment—that is, they set aside the higher punishment of expatriation, servitude, and confinement to a particular place, and they pronounce the more lenient, and, therefore, the distinct punishment of simple expatriation or exile from Scotland. This case took place so late as the year 1767: it clearly marks and confirms the distinction for which I contend, and it will not be asserted, that any competent authority has since varied or altered the law.

This doctrine of transportation, or *banishment*, accompanied with foreign or colonial imprisonment and servitude, which are one and the same thing, being founded in the authority of the state over foreign possessions, and controuled by the defect of power in the courts beyond the bounds of the realm, is no theoretical fancy of mine. It is the genuine result of the true principle of jurisdiction, and receives confirmation from the authority of Sir George Mackenzie,† who says, “With us, no judge can confine a man whom he banisheth, to a particular place *out of his jurisdiction*; “because he hath no jurisdiction over other countries,

* Maclaurin, p. 367.

† Criminal Law, p. 266.

“ and so cannot make acts, or pronounce any sentences
 “ relative to them.”

Nothing can be more decisive than this authority, to confirm the principle which I have laid down, or to shew that originally there was no transportation by the law of Scotland. The question then is, how did it become the law? For I admit, that to certain purposes, and as the punishment of certain crimes, it is now the law of Scotland to transport. But I contend that it is not the law as applicable to the crimes charged on Mr. Muir and Mr. Palmer.

The first instance of transportation in Scotland was in the year 1666 or 1667. It appears from Bishop Burnet's History* of his own Times, that the tyranny and violence of the Earl of Middleton and Archbishop Sharp had carried death and torture to such extremity, against certain covenanters who were taken prisoners in the battle of Pentland Hills, that the King wrote a letter to Scotland, calculated to repress the severities, without giving up the ministers who had directed them to be inflicted. The king said, he approved of all that had been done, but added, that there was blood enough shed; and therefore that the best of the prisoners should be set at liberty, and the incorrigible be *sent to the plantations*. Thus the executive power began by its own authority what the Privy Council, (a court as odious to the memory of Scotsmen, as the Star Chamber is to that of Englishmen,) carried into effect with the assistance of that executive power; and the crown of both kingdoms being worn by one person, by a kind of silent acquiescence

quiescence on the part of Scotland, the executive government of that country was enabled to carry these sentences into execution, though she had no plantations or dependencies of her own. Thereafter the punishment of transportation came by degrees to be inflicted by the Court of Justiciary; and I shall presently have occasion to shew in what manner the judgments of this last-mentioned court affect my argument. As to the Privy Council of Scotland, I deny the legal authority of that court entirely; I have therefore made no search into its records, for the purpose of this case, because they ought to be consigned, for ever, to oblivion, as the offspring of tyranny and injustice.

Here again I must observe, that this is no theory of mine, for here again I have the authority of Sir George Mackenzie to confirm my doctrine. He says in his *Vindication of the Government of Scotland*, in the reign of Charles the Second,* “As to the sending away the people to the plantations, it is answered, that none were sent but such as had been at Bothwell Bridge, or in Argyle’s rebellion; and it was changing a capital punishment into exile, which was an act of *clemency*, not of *cruelty*.” This historical remark and apology not only establishes the origin of the punishment, but shews the crime to which it was applied; and it will be seen, when I come to state the decided cases, that in conformity to this idea, there seems to be no case *less than capital* upon the records of *Justiciary*, for which the punishment of transportation

* P. 344.

has been inflicted; consequently every case, without a single exception, is a case of mitigation, by exchanging the punishment of transportation for that of death.

Before I proceed to state those cases to the House, I will take the liberty to point out the language which the legislature of Scotland has spoken on this subject, by which the distinction between transportation and banishment, on the ground and foundation on which I have placed it, is clearly and unequivocally proved, and the word banishment in the act of 1703 made out incontrovertibly, to mean simple expulsion from the realm.

There are various acts of Parliament on this subject. In the reign of Robert the Second, it is enacted in certain cases, *ut sit bannitus et exul*; and there is a series of acts from the time of James the First of Scotland, in 1424, to the act in question, in 1703, by which banishment is made a punishment. I will not tire you, Sir, with an enumeration of the acts, they are all upon the paper which I hold in my hand, and may be referred to by any gentleman who chooses to examine it.* In the acts sometimes the expression is *banish*, sometimes *banish the realm*, sometimes *banish forth of the kingdom*; but all these expressions, I contend, mean the same thing, namely, expatriation, without foreign confinement or restraint: and, it is evident, from the state of the country, that, until the reign of Charles the Second, they could

* Appendix.

mean nothing else. Among the statutes against Leasing-making, there is one passed in 1609,* the object of which may seem whimsical, as among other things, it makes it Leasing-making for Scotsmen to abuse Englishmen; now-a days, it might be more necessary to turn it the other way, and to make an act to prevent Englishmen from abusing Scotsmen. This act made the punishment of the crimes therein stated fine, imprisonment, *banishment*, or more rigorous corporal pain. It is a most material statute in the consideration of this question, because it is the act upon Leasing-making which immediately precedes the act of 1703. I need not inform you, Sir, that one of the most obvious, and, at the same time, one of the soundest rules for construing an act of parliament, is to look back and see what law it altered. If it altered the common law, by finding out that rule of common law which it altered, you will be enabled to interpret the doubtful words in the statute. If it altered an act of parliament, the same rule applies; by examining the act which it altered, a guide will be discovered for expounding the statute of doubtful meaning. Now, Sir, let me request those who are desirous of understanding this subject, to look to the statutes recited in the preamble of the act of 1703. They will find the act to which I have just referred, viz. 1609, cap. 9.† to be the last-mentioned act in that recital. This then is the statute which is to guide the exposition of the act in

* Appendix.

† It is cited in the statute of 1703, act James VI. Parl. 20. c. 9.

question,

question, not only because it is the law immediately preceding it, but because it is an act *in pari materia*, upon the same subject matter with that in question; and I need not enlarge upon its being an invariable rule in construing statutes, that all acts *in pari materia* are to receive a similar construction. The act of 1609 makes fine, imprisonment, and *banishment*, or more rigorous corporal pain, the punishment of the Leasing making contained in that statute. The act of 1703 makes fine, imprisonment, and *banishment* (leaving out more rigorous corporal pain) the punishment; therefore, upon the principles just stated, whatever the word *banishment* means in the act of 1609, that must be the meaning of it in the act of 1703. For that former act is not only the immediately preceding law upon the subject of Leasing-making, but the alteration is made by omitting in the latter act of 1703, the words in the former which go to corporal punishments, and retaining those words which relate to the other and milder punishment; the words retained, therefore, must receive the same interpretation in the last as in the first statute. Now, by the act of 1609, banishment could only mean simple expatriation, that is, exile from Scotland; it could not mean the aggravated banishment of transportation accompanied with confinement and servitude in a particular district, because the Court had no jurisdiction to inflict it, the legislature of Scotland, from defect of foreign colonial possessions, had no power to enact it, and usage had not in any respect sanctified it.

But

But the legislative exposition of the punishment does not rest here. There is another act of Parliament, which passed in 1670, cap. 1.* which renders it still more clear. Sir, I have already referred to the state of Scotland during the close of the last century. The violence of the government of Archbishop Sharp and the Earl of Middleton on the one hand, and that of the fanatics on the other, produced many extraordinary laws. Among others, the act of 1670, c. 1. was passed to compel unwilling witnesses to give the testimony against their fellow covenanters. It is there enacted, that the punishment of those who shall refuse to depone, "shall be fine and imprisonment, or "BANISHMENT, *by sending them to his Majesty's plantations in the Indies, or elsewhere, as his Majesty's Council shall think fit.*" Now Banishment by sending to his Majesty's plantations is transportation. If these words had not been added, and it had stood, that the punishment for refusing to depone should be *banishment* simply, it must have been held, according to every rule of construction, that the word banishment standing alone, did not mean the aggravated banishment of transportation, but the ordinary banishment of simple expatriation, otherwise there would have been no use in adding the words, "*by sending them to his Majesty's plantations,*" to have given it another quality, and thereby raised it to the higher punishment of transportation. But what removes all doubt as to this interpretation of the act, is this; the same

* Vide Appendix.

statute goes on to say, " That the deposition any person may make against *another*, shall not infer against *himself* the loss of life, of member, or *Banishment*," (without the additional words.) Now, under the unqualified expression *Banishment* is clearly meant simple banishment, or expatriation; not banishment to a particular place, as in the former clause, but banishment from the realm of Scotland. The person giving testimony, therefore, though he might have been punished under this clause, with any pain inferior to banishment, could not have been sent out of the realm of Scotland into exile. But if the words of the statute in this, as in the former clause, had been, that the persons making depositions under the authority of the act, *should not be punishable with the loss of life, member, or BANISHMENT by sending them to his Majesty's plantations*, then the persons making deposition might have been punished with exile from the realm of Scotland, that is, with simple banishment; because the term *Banishment* means no more than expatriation; but the superadded words, specifying the banishment to be to a particular place, namely, *the plantations*, converts banishment into that higher species of punishment, which is understood by transportation; consequently if the law had been so worded, persons giving testimony might have been banished or sent out of Scotland; whereas, as the act stands, nobody will contend that the banishment even of simple expatriation could have been inflicted. The true criterion to prove the distinction between *transportation* (or banishment to the plantations) and *banishment*, is to consider always what the

the punishment would be under the one prohibition, and what under the other. The prohibition of transportation includes banishment, but the prohibition of banishment itself, excludes the right to inflict this last-mentioned punishment. This act of 1670 therefore shews, that though the Scots legislature (from that inaccurate use of words, which I have before remarked as prevalent even in the courts and parliament of Scotland) did not adopt the language, yet it did adopt the distinction of the English legislature, by enacting banishment to a particular place, viz. *to the plantations*, to be the punishment in one case; while it excluded banishment *from Scotland*, as the punishment in another. I therefore contend, that I have established by the highest evidence of the law, viz. THE LANGUAGE OF THE LEGISLATURE IN ACTS OF PARLIAMENT, that the distinction between the punishments of banishment and transportation was in substance perfectly known and established in the law of Scotland.

Such, Sir, is the state of the statute law of Scotland on this subject, and such its sound construction. It is a singular feature in the constitution of the law of that country, that the effect and operation of statutes may be varied by usage, and that a series of judicial decisions will operate as a repeal of an act of parliament. If such a principle exists, to the extent contended for, every part of this discussion becomes more important from the consequences necessarily resulting from that principle. In this stage of the proceeding, however, I have no interest to combat it, because it will appear presently, that the cases strengthen my proposition;

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sition ; inasmuch as they shew, that the judicial decisions of the Court of Justiciary have not varied the punishment introduced by the act of 1703. But on the contrary, those cases, as far as they have gone, have confirmed and enforced the statute, and sustain the construction which I have put upon it.

To enable me to judge of the effect and full import of this part of the question, I have carefully examined every case in the printed books, which has any relation to the subject, and I have received minute information from the industry of persons of knowledge, capacity and accuracy, by an inspection of the Justiciary records in Scotland, directing that inspection to the particular objects in question. And I think I may venture to state, without the fear of contradiction, *That IN THE RECORDS OF THE COURT OF JUSTICIARY, there is not any instance of the punishment of transportation, for any crime, but such as is by the law of Scotland punished or punishable with death.* It would be endless, and of no avail, to go through each case particularly, especially as the object I have in view can be attained by considering the cases under distinct classes. The classes may be distinguished into cases that are *capital*, and cases that are *less than capital*.

The first class of capital cases consists of those, where the party has been convicted, and the appropriate and legal punishment was death. Such as cases of murder, rape, notorious adultery (which is death by the law of Scotland) assaulting a person in his dwelling-house, called *Hamesuchen* (which is likewise capital by that law) coining and other crimes. In these instances,

instances, *transportation*, according to the sense in which I have explained it, has been in use to be inflicted by the sentences of the Court of Justiciary. But as those were all of them cases, where it operated as an alleviation of the punishment which might have been pronounced, no argument can be drawn from thence to favour the legality of the sentences in question.

The second class of capital cases consists of crimes, in their nature capital, where the punishment has been restricted, according to the practice of Scotland, to a discretionary or arbitrary punishment. To understand this, Sir, it is necessary to observe, that previous to the matter being referred to the consideration of a Jury, there is a judgment of the court pronounced, upon what is called the Relevancy of the libel, or indictment; in which the court determines the nature of the crime charged in the indictment, whether it is so charged as to be sufficient in law, and what punishment the law annexes to the crime. It happens frequently in the course of this proceeding, that the libel or indictment, although the crime it charges be a capital crime, is limited to infer an arbitrary punishment, that is, any punishment short of death, which the court chuses to inflict. In such cases as these, the court has been in use to pronounce the punishment of transportation. But this class of cases does not, any more than the former class, affect the present question, or disturb any doctrine which I have laid down, or any conclusion which I have drawn from the statute law;

because the original crime being capital in its nature, to inflict the punishment of transportation was, in this, as in the former class, to use the words of Sir George Mackenzie in his vindication of Charles II. *mercy* and not *cruelty*.

A third class of capital cases is, where capital punishments have been pronounced, but have, by compact or pardon, been commuted for the punishment of transportation. This class of cases cannot shake my argument, because what is matter of agreement cannot affect the law.

Of crimes which might be reckoned on as *less than capital*, there is first of all a case of mobbing, tried in the year 1771.* In that case it appears that some of the parties convicted were transported. But this, though it seems to form an exception to my doctrine, yet, when examined, does not affect it at all. Because, in the first place, it is clear law, and law for which again I have the authority of Sir George Mackenzie, that *paritas rationis* was never held to be a reason for punishing crimes. But independent of that argument, the case to which I now allude, is one in which the parties are indicted upon the Riot Act, viz. the 1st of George I. which extends to Scotland. They are indicted too upon other grounds. But as far as they are charged upon the Riot Act, they are charged with an offence in its nature *capital*. The verdict is a general verdict of guilty,

* Criminal cases by Maclaurin, now a lord of Session by the title of Lord Deghorn, page 541.

and the court does not distinguish, and could not distinguish, in appropriating the punishment. Consequently this which appears at first sight a case less than capital, is in fact a capital case, and therefore forms no exception to the doctrine which I maintain, namely, that there does not appear to be any case, in the records of Justiciary, *less than capital*, in which the punishment of transportation has been inflicted.

The next case of a crime less than capital which occurs, is one of subornation of perjury,* which is, in my opinion, decisive of the whole question. The punishment inflicted by the Court of Justiciary upon a person convicted of that crime, as late as 1738, was *banishment*, with certification that if the party returned he should be *transported*. Here then is a case less than capital, where the punishment is arbitrary, that is, discretionary, where the discretion dictated the punishment of *banishment*, and where the greater punishment of *transportation* is to be inflicted in case of return; establishing at a very recent period, not only the gradation of those punishments, but the distinction between them.

The remaining cases which fall under the class of cases *less than capital*, are of the same nature with those which are the object of the present discussion, viz. seditious libel. The judgments upon which put this matter, in my opinion, beyond the possibility of doubt or cavil.

Early in the present century (when there was a disputed succession, and a deposed family pretending to

* Maclaurin, page 661.

the throne of these kingdoms) there were many prosecutions for offences in the nature of *Leafing-making*, by libelling the government of the country, and even the monarch himself. One of them happened in 1712; it was an indictment for *Leafing-making*, against a gentleman for distributing medals and making speeches in the faculty of advocates, tending to favour the pretender.* This indictment never came to trial; *the diet*, as it is phrased in Scotland, was deserted, and the matter was never carried farther. But though the jury did not try, nor the court pronounce judgment on the accused, it is a material case in one point of view. It shews, that for an offence of this sort (and there is no possible difference in the specific quality of that crime and of those in question) the charge was *Leafing-making*, and there was no attempt whatever to lay it as the crime of sedition alone, although a convocation of the people might have been proved.

The other prosecutions were in 1715, or near that period. They are all here before me, faithfully extracted from the *records of Justiciary*.

There are several of them, but I will confine my observations to two cases. The first, the case of *Graham*, CRAWFORD and *Hogg*, who were indicted for drinking the pretender's health in the streets of Edinburgh, with huzzaing, and hautboys playing to them all the time. They were indicted for *Leafing-making*.

Sir David Dalrymple was the lord advocate who prosecuted them. What he says is very material. In

* Mr. James Dundas of Arncliffe.

his information on the relevancy of the libel, which is not a speech spoken, but a written paper maturely weighed and deliberately advised upon, he lays it down that "*Leasing-making* is a general name for every injury tending to SEDITION or DISCORD; that the crime does not consist in speaking directly against the king, but in speaking falsely to engender sedition to the contempt of the king's authority, state, and dignity. The laws against *Leasing-making*, he says, were antiently odious; but *since the happy* REVOLUTION, that crime, amongst many others, has happily been removed. What was useful in the acts against *Leasing-making*, was preserved by the 4th chapter of the act of 1703. The BITTERNESS of the punishment is restrained, and so the ODIIOUSNESS of THE LAW is taken off."

This was the opinion of a Lord Advocate, deliberately given into the court in writing, within ten years after the passing of the act of 1703, when all the circumstances concerning it must have been fresh in his memory, and in that of the whole country; and when the persons who framed and passed the law, must have been still alive.

The old law, or, rather, the punishment of the old law, is not only reckoned odious, but it is clearly the opinion of Sir David Dalrymple, that the alteration brought about by the act of 1703, according to the genealogy which I have ascribed to it, is to be traced to the revolution; and that the object which was accomplished, namely, the restraining the bitterness of the punishment, and removing the odiousness of the law, applied

applied not only to *Leasing-making* or libel, but to all crimes tending to SEDITION and DISCORD; for he says in positive terms, that *Leasing-making* is the general name for every injury *tending to sedition and discord*. The punishment of transportation never entered his mind, as one which the Court of Justiciary could inflict in such a case; because, to inflict that punishment, would have been leaving the BITTERNESS of the punishment unrestrained, and would not have taken off the ODIOSNESS of the law.

The judgment on the relevancy of the libel under that indictment was, finding the *pannels** drinking the health of king James, and his happy restoration, relevant to infer an *arbitrary punishment*.

CRAWFORD is found guilty by the verdict of the jury, the others not; and the sentence inflicted by the court was *a fine of fifty pounds sterling*.

About the same time, OLIPHANT WATSON and others, magistrates of Dundee, were indicted for drinking the pretender's health, and for stopping the ringing of the bells of the town on the accession of George I. The libel was found relevant to infer an *arbitrary punishment*.

The jury found them guilty, and the court inflicted the punishment of deprivation of office, incapability of enjoying office in all time coming, and *a fine with imprisonment for one month*.

From these cases, Sir, I have a right to draw this conclusion; that the punishment of transportation is

* Defendants.

inapplicable to the crime of *Leasfing-making*, or to any crime tending to *sedition* or *discord*, not only upon the authority of Sir David Dalrymple, the lord advocate, and of the court which pronounced the judgments, but upon this strong and unanswerable ground, that there is not any instance to be found in the *records* of *Justiciary*, in which that punishment has been inflicted for such an offence: no one surely will pretend to say, that in the then existing state of the country, with a popish pretender, a recent rebellion and the house of Brunswick but newly seated on the throne of these realms, in a part of the united kingdom where the abdicated family was known to have many adherents, and where some of the parties accused were in the actual exercise of magisterial functions, the crimes alledged, and proved, and punished, were not crimes of a most heinous nature and most dangerous tendency.

From these cases, and from this deduction, I draw this undeniable conclusion, that, although transportation is an *arbitrary punishment* by the law of Scotland, it is an arbitrary punishment only in cases in their nature capital, because it is only in such cases that it has been used; that is, it is an arbitrary punishment in the scale downwards, but not in the scale upwards; that in that country as in this, it is a punishment appropriate to felonies, not to misdemeanors; that it cannot be ranked as an arbitrary punishment in inferior crimes, because to such crimes it never has been applied—and here, again, I must have recourse to Sir George Mackenzie, who says, as I have already shewn, that *paritas rationis* was never held by our ancestors

to be a reason for punishing crimes. A doctrine which being founded in a sound principle of criminal jurisprudence, viz. the certainty of punishments and safety of the accused, will apply universally; but which is peculiarly applicable to the understood constitution of the criminal law of Scotland, and is well illustrated by a leading and marked distinction between the constitution of the criminal law of that country and of this.

By the law of England, crimes are divided into certain generic classes, and it might, though not conclusively, perhaps be said, that you may reason from one generic set of crimes to another; but in Scotland there is no such distinction. There misdemeanor is not the genus of a *distinct* class of offences; but each offence of that sort stands, as it were, on its own separate and distinct ground. Therefore in reasoning on the law of Scotland, you cannot possibly reason from misdemeanor to misdemeanor, and say, because one misdemeanor infers one sort of punishment, another shall infer that punishment likewise. Usage forms a most material part even of the criminal code of the law of Scotland. The inferior crimes or delicts are all distinct and specific, and not generic. Usage, therefore, in regulating punishment, should be permitted to extend only to the cases where that punishment has been used, otherwise a supposed analogy of crimes would leave all arbitrary punishments in the will of the court, and annihilate all certainty, that most necessary ingredient in every system of criminal jurisprudence. If the arbitrary punishment of transportation, therefore, has been applied to crimes capital, it is fair to say, that it may be applied to all capital crimes, because they form a
general

general class. But if it has never been the usage to apply it to crimes less than capital, it shall not at pleasure be now extended to them. Nay, Sir, if that could be shewn, which I believe cannot be shewn, I mean, if it could be shewn that crimes less than capital had received that punishment, I should still contend that those crimes only to which the punishment of transportation has been specifically applied could be so punished, and that no crime or offence to which it never had been applied could at this time of day, by the will of the court, have that punishment pronounced upon it. For example, if *perjury* had been in use to be so punished, it would not follow that *libel* could be so punished; if *assault* had been in use to be so punished, it would not follow that *subornation of perjury* could be so punished, because the usage which had established the punishment in one case could not, by parity of reason, be held to extend it to another; and therefore, if the crime of *Leasing-making*, or those injuries which lead to *sedition* and *discord*, has never been punished with transportation, that punishment cannot be applied to it now. This doctrine, Sir, I persuade myself, is founded in sound sense, in substantial justice, and in the true maxims of criminal jurisprudence. Sir, it is a doctrine material in every view of it, particularly in considering those laws which have passed in the parliament of Great Britain upon the subject of transportation, because there is great danger, by combining the police regulations of those statutes with a loose construction of the law of Scotland in awarding punishments, of establishing a system

which would subvert, by inference, the whole system of Scots criminal law.

Sir, I shall now shew, in conformity to what I have stated in the close of my second proposition, that no statute of the British parliament has altered the law; consequently, that the Court of Justiciary has no power to pass sentences, which it did not antecedently possess; and that the law remains now, with respect to the crime of *Leasing-making*, and all crimes tending to *sedition* or *discord*, precisely on the footing on which it was placed by the act of 1703.

It is unnecessary, Sir, to inform the House that as to some offences, such as taking cloth from tenters, and certain offences on the *Borders*, the punishment of transportation was enacted in the reign of Charles the Second, soon after the Restoration. But the statute by which that punishment was introduced into the law of England, as generally applicable to felonies, is the 4th of Geo. I. c. 11. That statute proves, that in England there was no such punishment at common law, but that it is the creature of parliament, and all the statutes prove that transportation is a punishment for felonies only. The material observation at present, however, is, that the act of George the First ordains that nothing therein shall be construed to extend to Scotland.

The first British statute upon the subject of transportation, applicable to Scotland, is that of the 6th of Geo. III. c. 32, and it forms a very important part of the present consideration. The practice of Scotland, as I have shewn, had been to adjudge the punishment
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of transportation in *capital offences*, from the latter end of the last century, viz. from 1670 to the year 1766 when this last-mentioned statute passed, without any legislative authority whatever. At this last-mentioned period, it was found necessary to pass the act to which I have referred, which is material both in its title and preamble. It is "An act to extend the 4th of Geo. I. "so far as it relates to the more effectual transportation of felons, to Scotland." The preamble imports that there were certain provisions in the 4th of Geo. I. respecting the contracting for the servitude of the persons transported, which it would be convenient and necessary to extend to Scotland. It therefore enacts that it should be lawful to contract for such servitude, so often as *any sentence of transportation* should be inflicted.

This act, I admit to the fullest extent to which it can be contended, is to be considered as a statutory recognition of the punishment of transportation by the law of Scotland, because it is an act applying a regulation of police to a punishment supposed, by the very application of the regulation, to have a pre-existence. But the question is, what did it recognize, and how far forth did it sanctify the application of that punishment? I say it must be held to have recognized it so far as it had been used, and not one hair's breadth farther. Therefore, as the punishment of transportation does not appear to have been inflicted, in any case within the jurisdiction of the Court of Justiciary not in its nature capital, so the recognition is limited to capital crimes, and cannot be extended to any offence of a
lower

lower denomination. I admit that it sanctifies transportation as an arbitrary punishment—but as an arbitrary punishment for capital crimes only; that is, as an arbitrary punishment in mitigation, but not in aggravation—or in the language of Sir George Mackenzie, as an act of *clemency*, not of *cruelty*. And so the act is framed, for it is clear that it means only to regulate the punishment of capital offences, as is evident from its second section.

Upon this footing, the law stood from 1766 to 1785, when the separation from America, and the impossibility of transporting to that country rendered the act of the 25th of Geo. III. c. 46, necessary.

That act proceeds upon an act in the preceding year, regulating the transportation of convicts from England. The object of the English statute was to enable the courts to order persons liable to the punishment of transportation to be sent to such places as his Majesty, with advice of his Privy Council, should think fit; and in the speech from the throne, at the commencement of the subsequent session of parliament, his Majesty intimated that Botany Bay, in new South Wales, was to be the place.

The act upon which I have been observing did not include Scotland by name, and must therefore have been held not to have extended to Scotland.*

It is in the nature of a mere regulation of police, substituting a new place of transportation in the room

* It is intitled, “An Act for the more effectual transportation of felons, or other offenders.” It is 24th Geo. III. c. 56.

of America, to which we could no longer send our convicts. The act respecting Scotland, viz. the 25th of the King, c. 46, follows the English act verbatim in its title, and accurately in its object; it must be considered, therefore, as embracing the object of police or regulation only, in consequence of the loss of America, and cannot be supposed to have had in view any alteration in the penal code of Scotland. Of course, it must be construed so as to confine its effect to the object of police; and indeed, Sir, it would be a most grievous and alarming consideration, if it were possible by implication to make an alteration in the principle of the law, where all that was meant was a regulation as to the mode of executing a sentence. Hence I contend, that the construction of it must be *strictissimi juris*, without enlargement by implication beyond its meaning or professed object. Having seen that its object is mere regulation of police, let us next consider its enactments. It enacts, that "when any person shall be convicted of an offence for which the punishment of TRANSPORTATION or BANISHMENT BEYOND SEAS may be inflicted, it shall and may be lawful for the court to adjudge him to be transported to whatever place his Majesty, with advice of his Privy Council, may direct."

The question then is, does *banishment beyond seas* carry the power of the court higher than it stood before? To which I have no difficulty in saying, that it cannot be so held. 1st. Because it is a law of police, and must not be permitted to alter the criminal code, where that code limited punishment to simple banishment or expatriation

patriation, without the aggravations of confinement and servitude attendant on transportation. 2dly. Because, applying it to the subject under consideration, it is to be held, that whatever was the punishment which the act of 1703 imposed, that is the punishment lawfully to be inflicted, and no other mode of exile more aggravated in its nature. By act of 1703, banishment from Scotland only is meant, as I have already shewn; consequently *banishment beyond seas* could not be lawfully inflicted on the crime of Leasing-making, if by *banishment beyond seas* be meant the power of detaining the person so sent beyond seas in confinement in a particular place; and if so, the act of the 25th of the King, c. 56, does not by means of these words make any alteration in the law as to the subject under consideration. Next, it is clear that the words, *banishment beyond seas*, may fairly be construed to be synonymous with transportation, and to mean the same thing, or to be a mere explanation of that word. And what confirms me in that opinion is, the form and phrase of the act of the 6th Geo. III. There the word *transportation* alone is used without any explanation; yet every thing which relates to the mode of carrying transportation into execution, which can be done under the 25th of the King, could have been done under the 6th of the King, and therefore the words, *banishment beyond seas*, carry the case no higher in any respect than it stood before the 25th of the King,

It is impossible to argue, that if the offences under consideration had been committed, at any period between the year 1766 and 1785, (that is, between the 6th
of

of Geo. III. and 25th Geo. III.) that there would have been any pretence for extending the punishment of transportation to *Leasing-making*, or to any crime tending to *sedition* or *discord* under the words of the act 1766, or under its general import: and surely accidental words of mere tautology shall not be construed to have that effect, especially when no intermediate case has happened to justify a stretch so unthought-of and so extraordinary.

But, Sir, if these words could be construed to have the effect of thus altering the law, it is clear, that it was not the intention of the legislature to make that alteration; but that it is purely the result of an unobserved and accidental expression having found its way into this act of parliament, viz. *Banishment beyond seas*. In that view of the case shall it be said, that this House will stand by and see a sentence executed under such circumstances;—warranted neither by the statute law of Scotland, by the general system of the Scots criminal code, or by the analogies of the law of England, without endeavouring to stop it in its course?

Other important observations arise on the act 1785;* for example, “it is enacted, that if the transported person shall return to Great Britain or *Ireland*, that he shall (upon being lawfully convicted) suffer death, as in cases of felony, without benefit of clergy.” This clause is likewise to be found in the act of the 4th of George the First. It is likewise material to observe, that that clause is included in all the acts from the time

* 25th of Geo. III. c. 56.

of Charles the Second, down to the 25th of the King, c. 46. From hence I draw this conclusion, that without the enactment of the legislature upon every new system of regulation for transporting criminals, it would not be lawful for any court to inflict the pain of death upon return: and as parliament has observed the same rule in the statutes which relate to Scotland, as in those which relate to England, I contend that the observation is equally applicable to Scotland and to England. So that the legislature by inserting that provision in the act of the 25th of Geo. III. shews that Parliament did not think the power would extend to a return from Botany Bay, because it had been enacted in the 6th of Geo. III. with respect to returns from America.

If I have been successful in shewing that the act of the 25th of the King does not apply to the case of *Leasing-making*, or to offences tending to *sedition* or *discord*, and does not vary or alter the meaning of the word *banishment* in the act of 1703, it follows as a corollary from that proposition, that the punishment of death upon return cannot be legally inflicted. And when it is recollected that the view and object of this last-mentioned act was to repeal the punishment of death, in all the cases of public libel or *Leasing-making*, to which by the old laws of Scotland it had been applied; and that it enacts, that if the party is *poor*, and cannot pay a fine, he shall be punished in his body, *life and limb being always preserved*; it confirms that part of my second proposition beyond a doubt; viz. "That annexing the penalty of death upon return, is an aggravation of the punishment, not warranted by law."

Sir,

Sir, there is another most extraordinary circumstance in this sentence; which, though I do not rest upon it as affecting this case, fundamentally, yet I cannot pass it over entirely. It is a powerful instance of the ill consequences that arise from the want of an appellate jurisdiction. The act of the 25th of Geo. III. says, if the transported person returns to Great Britain or *Ireland*, he shall suffer death. The sentence says, (and I speak from an authentic official copy, for in such a case, I could not but distrust the printed account, till I found it coincide in this, as in every thing else, with the office copy of the record) I say, Sir, the sentence is, that if after being so transported, Mr. Muir shall return to, and be found at large within any part of *Great Britain* during fourteen years, he shall *suffer death*, as in cases of felony, without benefit of clergy. So that the act says one thing, the sentence says another. The act says, he shall be liable to suffer death if he returns to *Ireland*, or to Great Britain: the sentence says nothing of *Ireland*. Sir, the sentence should run in the very words of the act, otherwise it misleads. *Ignorantia juris neminem excusat*, is a principle of law which must pervade the jurisprudence of every civilized nation. Without such a principle, laws, both civil and criminal, would be incapable of execution, and therefore it behoves courts of justice, the more, to take care that their sentences run in the terms of the law; otherwise they operate as snares to the objects of them. What so natural as that the offender should look to the sentence only? If he does in this case, he might think himself safe to return to *Ireland*; and yet if he returns there, he will be liable to be execut-

ed as a felon, because ignorance of the law is no excuse. For although the sentence omits Ireland, the statute includes it, and the statute, and not the sentence, constitutes the law. If, on the other hand, it should be contended, that the court in its sentence is not bound to follow the act, it then comes to this, that the act is no part of the present consideration, that the judges *probably* did not read it, that they certainly did not proceed upon it, and consequently that the law is not varied by it; for it cannot be asserted that it varies the law, so as to cover the sentence, and yet that the court is entitled to deviate from the act of parliament which makes the law.

This, Sir, undoubtedly, is a most serious feature, not only in this case, but in the whole system of judicial jurisprudence in Scotland, in criminal matters.

In this stage of the argument, Sir, I do not hesitate to assert, that I have said enough to shew that grave and serious doubts exist with regard to these sentences in point of law, and that the crime, charged in the indictment, being nothing else than *Leasing-making*, the punishment must follow the statute of 1703; of which the highest punishment is banishment;—that no higher punishment could be inflicted, than mere expulsion from the realm, that is, from Scotland;—that although the party might be carried beyond seas, by the mode of executing the sentence of banishment, yet he could, afterwards, go, at his pleasure, to any part of the world but Scotland.

Having thus gone through the second proposition which I had the honour to lay before you, in the commencement

mencement of what I have said, I proceed now to shew, according to my third proposition :

“ That if the acts charged in the indictments do not constitute the crime of *Leasing-making*, or *Public libel*, the indictments charge no crime known to the law of Scotland ;”

First, “ Because there is no such crime known to the law of Scotland, at common law, as *Sedition* constituting a distinct and separate offence : and the offences in question do not fall within the statutory seditions.”

Secondly, “ Because if there is such a crime, at common law, these indictments do not charge it, and it would be contrary to law to punish that offence by *transportation* ; and not warranted by law to inflict the pain of *death* for returning from such *transportation*.”

OF the important and weighty considerations in this momentous cause, this seems to me to be the most weighty in its principle and consequences. The other parts of the case are grave and interesting ; but this, if I am not mistaken in my conception, oversets the most important maxim that is to be met with in the whole circle of judicial jurisprudence.

The maxim to which I refer, is that short but material one, that the office of a judge, or court of justice is, *JUS DICERE*, not *JUS DARE*, to *interpret law*, not to *make law*.

If the judicial power in any instance usurps the right of making laws, the consequence must be uncertainty, tyranny, and oppression. Yet if the crime of sedition, as contended for under these recent cases, exists in Scotland,

land, I will venture to assert that it can stand on no other ground but that most dangerous assumption of the legislative power, by the judicial.

Sir, I have heard that it has been said in the course of the late proceedings in the Court of Justiciary, "That alterations in the state of society produce new manners, that new manners produce new vices, and new vices produce new crimes." From which the inference to be expected is, that the legislature should regulate and provide for their trial and punishment. No, Sir, no such thing. The inference which has been made is, "That the Court of Justiciary has an inherent power to pronounce upon the new crimes, and to appropriate such a punishment to them as they shall think fit."

It would be a great relief to me to hear a denial of this representation. But if it was said, then I ask whether there ever was a doctrine held by the Star Chamber, or High Commission Court, which went more directly to the insecurity and oppression of the subject? And yet, without some such doctrine as this, I do not know how the crime of *sedition*, as contended for, in support of these judgments, can be maintained.

There are two classes of statutes relative to sedition, besides those against *Leasing-making*. The one class relates to risings or conventions in burghs, without authority. It will not be asserted that the cases of Mr. Muir, and Mr. Palmer fall under them. The other class relates to conventicles, or unauthorized assemblies, convoked for the purpose of seditiously promoting a certain form of church government. They were enacted upon the occasion

occasion of the religious commotions of the last century. They are all repealed, expired, or gone with the occasion which gave them birth; and it would not, at any rate, be said that they apply to the cases of Mr. Muir and Mr. Palmer.

There being no other class of statutory regulations which ranks sedition as a crime, its existence, in the sense contended for, must rest either on the proposition which I have stated, and which, I am sure, no body in this House will venture to maintain, namely, that the Judges may *make law* as well as *interpret law*; or upon some authority equal to statute; namely, a clear, unequivocal usage and an acquiescent legislature, which may constitute something like common law upon the subject.

Now, Sir, though I cannot have looked with my own eyes into the criminal records of Scotland, yet I will venture, upon the investigation which has been made under the direction which I have given, to assert three propositions, all of which I defy the learned Lord,* or any other person, however versed in the law of Scotland, to contradict.

First, I assert that there is not a single instance to be found in *the records of Justiciary*, where the crime of sedition has been tried distinctly from treason or Leasing-making.

Secondly, That there is not a single instance of sedition, indicted, tried, and punished as a crime at common law, by itself.

* Lord Advocate of Scotland.

Thirdly,

Thirdly, There is not a single instance of *sedition* being punished with *transportation*.

All these propositions are conceived in a negative form : yet, bold as it is thus to assert *negatively*, I have no difficulty in asserting them. If these facts cannot be contradicted, I am then entitled to say that there is no one requisite which can bring the crime of sedition, and the punishment of transportation for that crime within the principle of common law ; for if there is no instance of an indictment for the crime by itself, and none of the punishment of transportation having been inflicted, even, when it has been indicted for, in conjunction with another offence, there cannot have been any acquiescence or usage to establish its existence as a distinct indictable crime. The only other offence, to which the term of sedition is applied, is the crime of *seditio regni*, which was a crime of a higher nature, and amounted to treason. It is clear from one of the most ancient authorities in the law of Scotland, the *Regiam Majestatem*, Book I. chap. i. § 4 and 5, Book IV. chap. i. § 2 and 5, that sedition or *seditio regni* was a crime consisting of acts, and not of words aiming at the overthrow of the King and Government ; and that it fell within the description of treason, and was considered by Sir George Skene, a lawyer and antiquarian, whose authority will not be disputed, as treason.

It appears from Sir George Mackenzie's Criminal Law, Book I. tit. 7. on sedition (as I have already had occasion to shew, in reasoning upon the form of the indictment) that there is a clear distinction between
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sedition which amounts to treason, and the sedition which is analogous to riot; he terms this last, as I have already stated, *simple convocation*, and says it is not held generally to be *crimen per se*; and he lays it down distinctly that there is no gradation between the sedition of treason, and the sedition of *simple convocation* of the *Leiges*,* so that there is, not only, no case to support the crime, and punishment of sedition, as distinct from *Leasing-making*, but all the general doctrine is decidedly adverse to the possibility of such a distinction.

It seems as if all crimes against the state in Scotland had their origin in statute, and that between *sedition regni*, which is treason, and *Leasing-making*, or simple convocation, with the exception of the statutory crimes within boroughs and in conventicles, already alluded to, there is no intermediate offence; a doctrine which is confirmed by the opinion of Sir David Dalrymple (in the case of *Graham*) in 1715, to which I have already referred, and on which I will not again enlarge.

Upon this part of the law, a very serious consideration arises. Let us suppose that the whole STATE LAW of a country has rested on statute only, and that any part of the statute law is repealed, and nothing put in its place by the legislature: is it clear that by this act of repeal, a new crime rises at common law, as a necessary consequence of that repeal; and that it rests with the will of a court of justice to ascertain the nature of such an offence, and apportion its punishment? Such a doctrine would completely overfet the maxim to which I have

* *Leiges* means the people—Those who are bound to allegiance.

referred ; that Judges ought to *interpret law*, but ought not to *make law*. I take it, Sir, that there is a fundamental distinction, in this view of the subject, between crimes, which are *mala in se*, and those crimes which are in the nature of *mala prohibita*. In the first case, the crime would revert to its original order ; in the second, the question, with me, is, whether it would not sink entirely, until created again by an act of the legislature. For example, Sir, by the law of Scotland, *murder in trust* ; that is, a schoolmaster or guardian murdering his scholar or ward, was *treason*. By the treason laws of England being extended to Scotland, that crime is no longer treason ; but it does not therefore cease to be a crime ; for this powerful reason. The crime of murder is *malum in se*, and is prohibited by the law of nature, which is the common law of every civilized community ; consequently it returns to that class to which it originally belonged, and is triable and punishable as the crime of murder. But it does not follow that such is the case with crimes of positive institution ; and therefore when state crimes have stood invariably upon statute law, if those statutes which created them are taken away by statute, it should seem that the legislature which takes them away, must put something in their place ; otherwise, if it is left to the courts of law to act without statute, the judicial power would be confounded with the legislative, and judges might, according to their fancy, create what crimes, and inflict what punishments they pleased. So that if sedition was formerly enacted to be treason by the law of Scotland, and those treasons are repealed or varied by the act which made the treason law

law of England extend to Scotland; the treason of sedition is of course annihilated, but it does not follow that another offence of sedition rises at common law.*

In no view of this subject, therefore, can it be said that the crime of sedition exists in Scotland, at common law, *tanquam crimen per se*. Far less can the punishment inflicted be founded in law, for no instance of the punishment of transportation can be shewn, in the records of justiciary, in any case of *Leasing-making*; and no trial *whatever* for sedition alone, excluding always that sedition which amounts to treason. When to this I add the momentous consideration, that the Court of Justiciary, in which this legislative power is said to rest, is a court from which there is *no appeal*, but that it is at once *original* and *final*; I cannot for a moment give my assent to the doctrine contended for, in support of these judgments being justified, on the footing of the charge being for sedition generally, without admitting that there exists in this country, which boasts of its freedom and its laws, a system of judicial tyranny, as dangerous as any that ever was contended for in the arbitrary reigns of the race of Stewart.

* The doctrine here laid down is effectually proved, by the conduct of the parliament of Great Britain, in assimilating the treason laws of England and Scotland. By the seventh of Anne, c. 21. § 7. it is particularly provided, That theft in landed men and other crimes, which were treason by the law of Scotland, should thereafter be considered as capital offences; so that the statute even exceeds my position, by not leaving it to the common law to punish those offences as *mala in se*.

Upon the whole, Sir, I feel myself intitled to conclude, that the legality of these judgments is most questionable, because the crime charged in the indictments is merely *Leasing-making*; because the statute of 1703, limits the punishment of that crime to fine, imprisonment, and *banishment*, by which word, *banishment*, is meant simple expatriation, unaccompanied with the aggravating circumstances which attend *transportation*, because the pain of death is taken away by the statute of 1703; and yet by the sentences, death is to be inflicted in case of return: and lastly, because there is no common law crime of sedition, taken by itself separately and distinctly, nor any instance whatever, of the punishment of transportation for that crime to be found in the criminal records of the Court of Justiciary. From all which I draw this unanswerable conclusion, that what should lead to the reversal of the sentence in a court of law, upon the ground of legal error, should determine this House to address the throne for *mercy*, as the only means left to attain the ends of justice.

I am perfectly sensible, Sir, of the unavoidable length of the subject, which I have thought it my duty to bring forward. But the importance of the case to the public, and the necessity I feel, on my own account, to make out every point, in a question which brings before you the conduct of a supreme court of judicature, in matter of law or discretion, make me hope that you, Sir, and the House, will continue to me that favourable attention which you have hitherto

hitherto shewn me, especially, as I can promise that the topics which I am now about to agitate, are of a more interesting nature, than that long legal discussion which I have been under the necessity of laying before you.

I now proceed to state certain specialities in the case of Mr. Muir, which do not constitute legal error, but which, according to the law of this country, would induce a court of justice to grant a new trial, and should therefore induce this House to adopt the motions with which I shall conclude. According to the practice of Scotland, if a party is once condemned, however evident it may be that he has not been properly tried, he has no remedy, but must resort to the mercy of the crown, or the interposition of parliament.

In the case of Mr. Muir, there has been a MIS-TRIAL. *First*, because evidence was admitted against him, which ought not, according to law, to have been admitted. *Secondly*, because persons were permitted to pass upon the Jury, to whom there was a legal ground of objection. *Lastly*, because a witness, who was called in his defence, was committed for prevarication, prevented from being examined, and his testimony withheld from the consideration of the jury; notwithstanding the interposition and application of Mr. Muir to have him examined. It will be necessary, in order to make the first of those objections intelligible, that I should explain, to the House, a circumstance of a peculiar nature in the criminal law of Scotland. By that law, under an act of the twelfth parliament of James Sixth of Scotland, and

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First of England, cap. 151, it is ordained, "that in time coming, all criminal libels shall contain, that the persons complained of are *art* and *part* of the crimes libelled, which shall be relevant to accuse them thereof, so that no objection or exception take away that part of the libel in time coming." By *art* is meant, that the crime was committed by his contrivance; by *part*, that he was a participator in it. In one word, it is analogous to the term *accessory* in the law of England. From the statute just referred to, the person charged as principal could likewise be charged, in the same indictment, as accessory to those very crimes with which he was charged as principal. But then it is clear that the charge of accessory cannot, by the words of the statute, apply to any other crime than the principal crime charged or libelled, nor to any other *time* than the *time* laid in the indictment.

All that the statute does, is to prevent the indictment from being defective in law, because it contains allegations that the party, charged as principal, is accessory to those very crimes with which he is charged as principal. Accordingly in this indictment, Mr. Muir is indicted as being *art* and *part* in the crimes with which he is charged principally. It is material therefore to see what the principal crimes are of which he is accused, and what the time is when he is said to have committed them. The acts of criminality charged are, having endeavoured by speeches to inculcate seditious doctrines at certain places specified. Having distributed Mr. Paine's works, certain passages of which are set forth in the indictment of criminal libel. Having

put into the hands of one William Muir, a work called the Patriot, and having laid before a meeting of the friends of the people in Edinburgh, the Address of the United Irishmen. These are the specific offences charged, and the time of committing them is set forth to have been in the months of September, October, November, and December, of the year 1792. It appears from the forty-first and forty-second pages of the trial by Creech, that Robert Weddell, a witness for the prosecution, was asked if he remembered *Flower* on the French Constitution, being mentioned by Mr. Muir, and what was said of it? Mr. Muir objected to this question, because nothing respecting that book was charged against him in the indictment. The Lord Advocate contended that he was entitled to support the general charge of sedition, in the minor proposition of the indictment, by general evidence. Mr. Muir said, he could not be permitted to prove the murder of *William*, under an accusation of the murder of *John*; so the inquiry about *Flower's* book could not be admitted where the charge was publishing *Paine's*. Mr. Creech's account says, that the court was going to give their opinion, when the Lord Advocate said he would not give them the trouble, at it was a matter of no importance. The other accounts of the trial say, that the court did give their opinion in favour of the evidence being admissible under the general charge of *art and part*, or *accessory*; and that the Lord Advocate then declined proceeding. This part of the trial, therefore, only shews the tendency of the practice and opinion of the court, without forming a ground of objection,

jection, the evidence not being pressed. But in the *fifty-fifth* and following pages of the trial by Creech, it appears, that the same principle was insisted upon by the prosecutor, and ruled by the court.

Anne Fisher, a menial servant in Mr. Muir's family, says, " That she remembers Mr. Muir speaking of the
 " courts in this country, and saying a reform was necessary in the court of session and justiciary ; that
 " there was much nonsense in the Lords coming in
 " parade into Glasgow, and that the court got their
 " money for nothing, but passing sentence on poor
 " creatures ; that after a trial in Glasgow, where Mr.
 " Muir was advocate for two soldiers, he said, he had
 " told the court and jury what they might expect."

" *Mr. Muir* here objected to the witness's observations on his slandering the court, being admitted as
 " evidence, on the same grounds as before, as such a
 " charge was not to be found in the indictment."

" *Lord Advocate*. The question is simply this ; Has
 " the pannel done any thing feloniously or seditiously
 " against the king or constitutional government of the
 " country ? and to establish this, I may draw my evidence from every quarter, and from every subject,
 " not merely from people in the streets, but from his
 " domestics ; nor am I obliged in the indictment to
 " go into a full condescendence of facts ; otherwise
 " I might have made it large enough to have encircled
 " the room."

" *Mr. Muir*—I mean only to state a broad fact,
 " which is, that all criminal indictments should be
 " particular, and the facts specially condescended
 " upon,

“ upon ; that if I am accused of murdering John, I
 “ may not be charged with murdering James ; so for
 “ the same reason if I am accused of sedition, the facts
 “ intended to prove that, must be amply stated.”

“ The court were of opinion, that the general
 “ terms of the indictment were sufficient to warrant
 “ the questions relating to the courts, which were a
 “ part of the constitution of the country ; that the
 “ statute, 6th Jac. I.* allowed other facts to be ad-
 “ duced to establish the general crime charged, and
 “ therefore repelled the objection.”

By this decision, matter was permitted to go to the consideration of the jury, which upon every principle of law ought to have been withheld from them. And here again, Sir, I call to my aid, the supporter of the duke of Lauderdale, and the apologist of all the judicial tyranny of the reign of Charles II. *Sir George Mackenzie*, in his criminal law, title ART and PART, lays it down, that the crime which is laid as the principal crime is that, alone, to which the evidence, under the charge of accessory, can apply. But, Sir, it seems, as it were, an insult upon common sense, to have recourse to legal authority to enforce this argument, because it is founded in the invariable and immutable rules of justice, which must equally pervade the laws of all civilized countries ; unless we are to learn now, for the first time, that the very first, and most obvious principles of criminal jurisprudence are no longer to form a part of the system of our penal laws. I assert

* This means the statute referred to above.

that the law of Scotland, as well as the law of England, requires, that a person accused should have the crime specially set forth, and the time and place of commitment assigned. The law of England has been in this respect subject to some ridicule, because, though a day must be laid in the indictment, that day need not be adhered to in proof. It is to be remembered, however, that though the day laid may be departed from, still a particular day must be proved ; so far precision is required. The law of Scotland may admit of still greater latitude as to time, but even the law of that country does require, that some particular time should be specified. In the indictment against Mr. Muir, the crimes are particularized, the place of committing them is set forth ; and it is laid, that they were committed some time within the four months of September, October, November, and December, of the year 1792. The accused then comes to defend himself against the charge of having committed the *specified* crimes, at the *specified* places, and within the *specified* time, when he finds two words, *art* and *part*, introduced into the indictment, under which the court think it lawful to permit evidence to be given of any act he may have done, or any words he may have used, at any period of his life, in moments of domestic privacy and inadvertence, to be proved by a menial servant who may have listened at the door, or been attending the family in the season of careless conviviality. Is it possible that a doctrine so subversive of justice, tending so directly to mislead the accused in his defence, and to take him so perfectly unprepared, can be the law of
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any country that calls itself civilized? Or that an act which passed at the very beginning of the seventeenth century, merely to entitle the prosecutor to charge the principal as accessory, without rendering the *Libel** void in law by a defect of form, should be construed in the end of the eighteenth century to authorize a species of proof, of which the indictment gives no notice? What innocence is safe, what virtue is secure under such a system? The crimes charged are specific; among them there is not a hint of any abuse of the courts of law, yet that fact is given in evidence; a fact equally calculated to prejudice the jury in their verdict, and the Judges in their sentence. For what breast is so armed against prejudice, as not to be affected by an attack upon what they may conceive to be their dignity and justice? The tendency of the fact, therefore, as well as its being no part of the crime charged, is an additional reason against its being admitted in proof. But the fact charged does not fall within the time laid, it relates to another period, and to matter (if it took place at all) quite distinct from that which is the subject of accusation. Sir, if in this extensive and various subject there did not exist another consideration, I should say, that this alone was sufficient to prevent Mr. Muir from being transported to that loathsome seat of crime, desolation, and military despotism.

I now proceed to state the objection respecting the jury which was impannelled to try Mr. Muir.

It will not be necessary for me to consume any part of the time of the House, by establishing, that chal-

* Vid. the words of the statute, sup. p. 60, *Libel* means indictment.

lenges to the jury, *for cause*, in such a crime as that under consideration is competent to the accused by the law of Scotland, because the conduct of the court admits the right to its full extent. If it were necessary, or if it should be denied, I am ready to argue it, and to establish it from acts of parliament, from precedents, and from the authority of Mr. Maclaurin, now a lord of session, by the title of Lord Dreghorn, a most enlightened and liberal reporter of Scots criminal cases.

When the five first jurymen were called to pass upon the trial of Mr. Muir, it appears both from the official copy of the trial, and from the printed trials before me, that Mr. Muir objected to them as members of an association, called the Goldsmith's Hall Association; and that the Solicitor General answered the objection. From the official copy of the trial it appears, that the objection was *repelled*. In the printed trial by Creech, the Lord Justice Clerk is made to say, "that it would go to exclude every man who had taken the oaths to government."

Sir, I have already stated that one of the charges against Mr. Muir was the publishing and disseminating Paine's book. Now, Sir, one of the declared and express purposes for which the society at Goldsmith's Hall was associated, was to counteract seditious doctrines. Another object was to check and counteract the measures taken to bring about a reform in the representation of the people in parliament. As far as these objects go, and as far as I have yet stated them, there certainly was nothing in the conduct or opinions of the members of the association of Goldsmith's Hall, which could have constituted a valid legal

legal objection to their being upon the jury of Mr. Muir. But, Sir, that association went a step farther, and upon that the objection rests. In the first place, they had offered a reward to any person who should discover the circulators of Paine's works, in order that they might be brought to justice. So that the members of that association had actually decided upon the guilt of that particular act with which Mr. Muir was charged, namely the disseminating and circulating Paine's works. To admit such persons upon his jury, could be attended with one event only, his necessary and inevitable conviction. It never could be imagined that those who had offered a reward for discovering the person who should circulate that work, in order that he might be brought to justice, would fail to find him guilty, when they should be called to sit in justice upon him; for the very terms of their association decided upon the criminality of the work, by an extra-judicial decision that it was libellous. But, Sir, there is still another ground of objection to the members of the Goldsmith's Hall Association. Mr. Muir, and other gentlemen who belonged to a society for parliamentary reform, went and signed the association at Goldsmith's Hall. The association struck his name from their book, and in other respects, expressed an opinion of the criminality of the objects of the society for parliamentary reform. The question, Sir, is not whether those objects were criminal or innocent; but whether the members of the association had so expressed themselves? If they did so express themselves, I venture to say, that there is not a principle of law,

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or justice, upon which it could be pretended, that they were admissible as jurymen; or, being admitted upon the jury to try Mr. Muir, a pretence for saying that he had a fair trial. But, Sir, I do not rest on general principles of substantial justice, nor on reasons of analogy to the law of England. I say the case has been solemnly and judicially decided in the law of Scotland. In the year 1635, Lord Balmerino was indicted for this very crime of *Leafing-making*. The trial, though a Scots case, is to be found in Mr. Hargrave's edition of the state trials, Vol. I. p. 470. By the practice of Scotland, when a peer was to be tried, his jury consisted partly of noblemen, and partly of men of great landed property. Lord Balmerino objected to Lord Marshall being one of his jury; alledging that he had used expressions which implied that he considered him (Lord Balmerino) as guilty. It was left to the oath of Lord Marshall. Lord Marshall swore, that he had never used such expressions, and he was permitted to pass upon the jury. Lord Balmerino made the same objection to Lord Dumfries. It was put to Lord Dumfries's oath. He swore he had never expressed himself as supposed. Lord Dumfries was permitted to pass upon the jury. The objection was then made to Lord Blantyre. It is alledged against my Lord Blantyre, "That he cannot be upon *the assize* because he had publicly reported to *sundry*, that the pannel, in his judgment, "was guilty of *the dittay*, and cannot be cleared thereof, which they refer to his lordship's oath, who "being sworn, said he could not deny that he had
" spoken

“spoken such speeches; whereupon he was repelled, and
 “and ordained to stand aside.”

Sir, it is impossible, if I had been to invent a case on purpose, that I could have thought of one more precisely calculated to meet every fact and principle for which I contend, on the present occasion. The members of the Goldsmith's Hall association had, to use the language of 1635, *publicly reported to SUNDRY, that Mr. Muir was guilty of the DITTAY, and could not be cleared thereof.* For they had resolved and published, that the matter with which he was charged was a crime, and they had assigned it as a reason for striking his name from the association, that he had actually done those things which they had declared generally to be criminal.

Sir, the objection is no personal reflection on the individuals who composed the jury, some of whom I know intimately, and value sincerely. A legal objection never can be a personal reflection in any fair or candid view of it. I insist then, Sir, that, both upon principle and precedent, the objection taken by Mr. Muir to the first five jurymen, ought to have been admitted, and, that not having been admitted, he was not tried pursuant to the rules of law. If the case had happened in this country, he would, upon this ground alone, have been entitled to a new trial; or in those cases, where the form prevents a new trial from taking place, the execution of the sentence would have been suspended, till the legality of the admission had been discussed by all the judges of England. In Scotland the usage does not admit of any such proceeding,

or any such relief; so that the only means by which this *mis-trial* can now be remedied, is by the merciful exercise of the prerogative of the crown in alleviating or pardoning the sentence which has been pronounced.

The next point to which I mean to call the attention of the House, is but a word; it relates to the evidence of a person of the name of William Muir, who was called as a witness for the prosecution. He refused, from a conscientious or religious scruple to take the oath, upon which he was committed to prison, and informed by the court, as well as by the learned Lord opposite to me, that he must remain there for life, for that they knew of no law by which he could be liberated. Sir, an opinion so preposterous in itself, and so contrary to all sound, legal, and constitutional doctrine, ought to be stated, were it only that it might be reprobated. But I state it, because I conceive it likely to have operated, not only upon that witness, who was afterwards persuaded to give up his scruples, and take the oath, but because other witnesses might be intimidated, and consequently that it is to be considered as a circumstance tending to produce an unfair trial.

The next subject of consideration is, the conduct of the court, with respect to the evidence of JOHN RUSSEL, who was called as a witness by Mr. Muir, in his defence. By the law and practice of Scotland, every witness, before he is examined *upon the principal matter*, is asked certain preliminary questions, to ascertain the credit that is due to his testimony. One of those questions is meant to discover whether he has received
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partial council or advice, as to the evidence he is to give. I agree that it is necessary, that the witness should answer the *initial* questions before he is permitted to be examined; that is to say, if he were, contumaciously, to refuse to answer, his testimony could not be received, because he had resisted what the law requires. Were the present case of this description, I should have nothing to offer to the House upon the testimony of John Ruffel. The case upon which I have to observe, is of a very different sort. The office copy of the trial states, "It being observed by the Court that this witness (John Ruffel) had been guilty of *concealing the truth*, therefore the Justice Clerk and Lords Commissioners of Justiciary ordain him to be carried to prison for *concealing the truth*, there to remain for three weeks."

The printed trial by Creech, p. 87, 88, states that "John Ruffel, merchant, on being asked the usual question, if any body had instructed him what to say? replied, that he had received general instructions to tell the truth—Being asked, where or from whom? said he could not recollect—Having produced his citation, it was found to be dated but four days before; and, as this conversation had happened since that time, he was told, that he must certainly be able to recollect some of the particulars: but on his still persisting to say he could mention nobody's name who had spoke to him on the subject, the Lord Advocate moved that he should withdraw, and observed, that as there appeared evident signs of a desire to conceal the truth in this

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" man,

“ man, he hoped their lordships would punish him by
 “ ordering him to be committed to prison.

“ *Mr. Muir* was going to say something in behalf of
 “ the man ; when the Lord Justice Clerk stopt him
 “ by telling him he had nothing to say in that ques-
 “ tion ; and the court then ordained John Ruffel to be
 “ committed to prison, there to remain for three
 “ weeks, for concealing the truth upon oath.”

From both these accounts, it appears that the witness was not rejected for contumacy, but that he was charged with having *concealed the truth*, in his manner of answering to the preliminary questions. The prevarication, not the contumacy of the witness, was the reason for not examining him, and for committing him to prison.

Upon this state of the case (in which the record confirms the account contained in the printed trial) it is clear upon every principle of justice, and upon every technical rule of Scots law, that the defendant was entitled to the benefit of Ruffel's testimony ; and, therefore, refusing to hear his testimony constitutes a *mis-trial*, in so far as his evidence might have materially affected the verdict of the jury and the judgment of the court. And here again I must have recourse to the minister of Lauderdale's oppression, to support and enforce my argument. *Sir George Mackenzie* lays down the distinction between competency and credibility in clear and perspicuous terms, as a distinction well known and recognized in the criminal jurisprudence of Scotland ; and indeed it is impossible that the distinction should not exist, where-
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ever law exists, for it is a distinction essential to substantial justice. In the 255th page of his criminal law, that author says, there is one set of objections which go to *the persons of witnesses*, and another set of objections which go to *what they say*; that is, in other words, there are objections to their competency, or to their being admitted at all, and there are objections to their credit, or to the effect which should be given to their testimony. Now, Sir, I maintain that the objection to the testimony of John Russell went to his credit, and not to his competency. Had he refused to speak at all, he might have been rejected for the contumacy of that refusal: but by the very statement of the ground of his commitment, it appears that this was not the case; for he was committed for *concealing the truth*, as appears by the entry in the office copy of the judgment. If I were inclined to argue the question upon the strict words of the entry on record, there is not, I will venture to say, the shadow of an answer to be given to the objection of rejecting this witness; for *concealment* of the truth is matter that goes merely to the credit of the witness. But I admit (although it does not appear from the record itself) that the *concealment* or *prevarication* took place in the *initial question*; and cannot be applied to the principal matter. But I deny that this makes any difference as to the real merits of the case. At whatever stage of the examination it took place, if it was a concealment of the truth, or prevarication, even amounting to perjury itself; I insist upon it, that it is a question of *credibility* and not competency. Sir,

I see over against me, learned gentlemen, who frequently act in the character of supreme judges. I ask those gentlemen then, whether in dispensing justice they do not consider credibility, as a question of fact; whether when they assume to themselves the right of deciding, as to the *competency* of a witness, they do not with the utmost caution, leave the credit due to the testimony given by a witness, to be decided on by the jury as matter of fact; and whether they durst venture to dismiss a witness without examination, because he had delivered his testimony in a prevaricating manner, or even in a manner which might require his being committed for perjury, provided there was no objection to his competency? Sir, I know that no person entrusted with judicial authority in a court regulated by the principles of the English law, will venture to accept my challenge, and I am confident that the same rule is equally well established, and ought to be equally well observed in Scotland.

I would ask the same gentlemen, or any others, not only capable of making a legal distinction, but capable of drawing those conclusions which are the result of plain common sense, whether prevarication, or that conduct upon the part of a witness, which leaves the truth or falsehood of what he says, as a matter to be weighed and considered, is not uniformly and invariably a question of credibility, and consequently a question of fact for the jurisdiction of the jury, and not matter of law for the court? I conclude, therefore, that as the testimony was withheld from the jury, by the authority of the court, Mr. Muir so far forth has

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not been tried. The rejected witness might have given important testimony for the defendant; he might have been believed by the jury, and his testimony might have altered their verdict. It might too have had an influence on the severity of the sentence; but into that I do not now enter. I rest the case upon this, that prevarication goes merely to the credit of the witness and does not affect his competency, a strong-hold from which no ingenuity nor talents can move me. This witness having been committed before his evidence was heard, the defendant was mis-tried; and there being no remedy for such *mis-trial*, by the law of Scotland, I am upon that consideration alone entitled in this place to call upon the justice of the crown, through the medium of the address of the representatives of the people, to avert that punishment, which, I have a right to say, might never have been inflicted, if the testimony of Ruffel had been given and considered by the jury.

Sir, the conduct of the court, in rejecting the witness under the circumstances stated, and the principles upon which it is justified, lead to nothing short of depriving the subject of his trial by jury. For if the court can by its unquestionable authority withdraw from the jury the power of judging of the credit due to the witness, in the fullest extent, it can shut out from the trying tribunal, that for which it is alone instituted, namely, deciding upon the guilt or innocence of the accused, according to legal and admissible evidence.

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Mr.

Mr. SPEAKER, I have now shewn that there was such error in law, as might have led to a reversal of the judgment; and such rejection and admission of evidence as should have laid the foundation of a new trial. In going through those two most important divisions of the subject, I have done all in my power to preserve that calm, and if I may use the expression, that judicial temper of mind, which such a subject as the present, in all the views of it, requires. I have made no allusion to the characters of judges, whose individual characters and legal information I know to be most respectable. I trust that I have not shewn any tendency to personal invective, and the judgments, in the opinion which I entertain of them, do not admit of encomium. I consider myself, in what I have offered to you, to be as much abstracted from any offensive personal attack upon the Court of Justiciary, as if I had been arguing, professionally, in a court of law upon a writ of error, to reverse a judgment, or in support of a rule to obtain a new trial.

In the part of the subject which remains, it shall, still, be my aim to preserve the same temperate line of discussion; but I am ready to admit, that it may be more difficult to execute my intention with success. Sir, there is something in the nature of the punishment imposed upon these unfortunate persons, by this extraordinary and unprecedented sentence, which does so agitate the feelings, and affect the heart, that I am at a loss how to open, or, in what manner, to unfold the question of discretion; but I must now proceed to it, and I hope I shall accomplish the discussion in such
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a temper, as is not inconsistent with the decorum which is due to a court of justice, or the gravity which belongs to the subject.

Sir, it has been repeatedly said in this House, as I have had occasion, in the outset, to remark, especially by a right honourable Gentleman,* high in his Majesty's service, that the discretion which dictated these punishments was a *sound discretion*.

I am ready to admit, that there is no question in the whole circle of judicial consideration, in which there is more difficulty than that of determining the just measure of *discretion*, in affixing a punishment, where the law has left the degree and measure of it in the power of the court. The law undoubtedly holds out principles for legal discretion, but it is so difficult in many cases to discover a just guide for its direction, that I have often been tempted to think, that as it was one of the most delicate branches of jurisdiction, both to the feelings of the judge and the interest of the public, so it would be desirable, if it were possible, to relieve the judges from that duty. In most cases of discretionary punishment, a different conclusion will be formed of its mildness or severity, according to the different frame and structure of the characters and tempers of those who contemplate it. Their opinion about the state of the public mind, their apprehension of danger, or confidence in the security and permanency of the existing system of things, will produce various conclusions, as to the proper degree of pu-

* Mr. Pitt.

punishment for a state offence. Those who are apprehensive and alarmed, will think one measure of punishment no more than due; when he who feels little or no alarm, will consider a much less degree of severity to be excessive and unjust. To find a criterion or guide is a consideration in ordinary cases to be looked for in vain; on the present occasion, I trust, I shall shew, to the satisfaction of the House, that we have obtained this grand DESIDERATUM, and that there was no difficulty arising from the want of a just criterion to regulate the exercise of the discretion of the Court of Justiciary. To judge whether the discretion exercised was a *sound discretion*, it is necessary first to consider the nature of the offence, and then to compare it with the precise extent of severity contained in the punishment.

The offence of Mr. Muir and Mr. Palmer is a misdemeanor, and nothing more. Such as in this country would have received the punishment of fine and imprisonment. The pillory, undoubtably, is likewise a competent sentence in cases of misdemeanor; but of late years it has seldom been pronounced, and, I believe, it has not been recently executed in the instances, in which it has been pronounced. The offence of Mr. Muir consists, among other things, in publishing the writings of Mr. Paine. Mr. Paine has been convicted as the author of that which Mr. Muir circulated. Were Paine to return to this country, and the court of King's Bench had to inflict the punishment, for the offence of which he is found guilty, (namely, the being the author or publisher of those

those books) by the law of England, the sentence must be restricted to fine and imprisonment, and if pillory were to be added by the court, I am entitled to say (according to the recent practice) that the advisers of his Majesty would take care to prevent the execution of that part of the sentence, by pardoning it, or passing it by. The other parts of the charges against Mr. Muir are of the same nature, namely, publishing libels; and they agree with the charges against Mr. Palmer in one respect, his sole offence being the distribution and circulation of a paper charged as seditious. Instead of fine and imprisonment, which could have been the only judgment pronounced on such offences, in England; the punishment inflicted on these two persons is *transportation*; a punishment adapted and appropriated only to felons and capital offenders. A transportation too the most aggravated in its mode and circumstances, that is to be found in the history of the penal laws of this, or perhaps of any country. Not like that transportation which took place before our separation from America, when there was a short and easy voyage to the place of destination; a cultivated and inhabited country, a free and civilized people, speaking our own language, following pursuits similar to ours, and where servitude might be alleviated by the example of neighbours, and that tenderness and lenity which are the invariable concomitants of civilization, freedom, knowledge, and morality.

Far different is the transportation to Botany Bay. The voyage is long and tedious, and so inconvenient

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and distressing, independent of the transportation, as to be a much more severe and dreadful punishment, than any which the laws of England would permit to be inflicted for such a crime. Look, Sir, into the report * upon your table, describing the severities, the hardship, and almost certain death attending that voyage, and you will then be able to judge how far I am guilty of exaggeration. When they have arrived at the place of destination, the contrast with the comparative happiness of an American transportation and servitude, is equally striking. In New Holland there is an inhospitable soil, so barren that no industry can render it productive ; where the means of subsistence, depending upon the supplies from hence, are, frequently, so scanty as to threaten the whole establishment with famine, against which the utmost industry of the executive government at home cannot guard. There is *without*, a barbarous and hostile people, of savage manners and unknown language. *Within*, instead of masters whose mild treatment might alleviate the sufferings of those under their power, the Governors are armed with all the severity of military despotism. Instead of companions, whose society might soften the afflictions of slavery and disgrace, they are surrounded by the outcasts of every jail in England, ignorant in mind, abandoned in their morals, and devoid of every quality that belongs to civilized man. Yet this, Sir, is the situation to which WE are to per-

* Report of a committee of the House of Commons on this subject, in 1792.

mit men to be sent for a residence, in one case, of *seven*, in another of *fourteen* years, more than the computed duration of human life in any situation, and at any period of it; men whose education and habits have been such as to entitle them to be admitted to the most respectable and most learned professions that exist amongst us!

An eloquent and philosophical historian remarks upon the manners and government of the Romans, under the tyranny of the Emperors, that there were two circumstances, which rendered despotism peculiarly dreadful to that people. Comparing them with the absolute governments of the East, he says; In these last, the language afforded no other word for government, but despotism; and the subject; considering that he held his life at the will of the Prince, looked upon the loss of it by the order of the Prince, only as an additional means used by Providence to deprive him of his existence. But the minds of the Romans under the Emperors, he says, were very differently prepared for slavery. The education of Tacitus and Pliny was the same with that of Cato and Cicero; from the study of the Grecian philosophy, they imbibed the highest notions of the dignity of human nature, while they were forced to submit to all the miseries of despotic power. So it is, Sir, with this dreadful and unprecedented punishment; the minds of those, who are the ordinary objects of transportation to Botany Bay, are accustomed only to their fetters and their jail: their imaginations conceive, and their language expresses nothing but immorality and vice, and they

consider the abridgement of liberty, or the deprivation of life by the executioner, as natural dispensations of Providence, which they have reason to expect as the consequence of their crimes. But the unfortunate persons, who are the objects of my address to you to day, educated as men of learning, and bred up in the habits of virtue and religion, had no reason, from any former precedent, or acknowledged power, to expect a fate which is worse than death itself.

Sir, the enlightened historian to whom I have referred, says, there was another leading feature in the Roman oppression, which increased and aggravated its severities. In modern Europe, the division of countries into different kingdoms softens the severities of arbitrary power. The example of one monarch may make an impression upon the mind of another; and if that is not always the case, still the object of his severity may escape from his vengeance, and in another country, find a new fortune adequate to his merits, the freedom of complaint, and perhaps the means of revenge. " But the empire of the Romans filled the world, and when that empire came to be governed by a single man, the world became a secure and dreary prison to his enemies. To resist was fatal; to fly, impossible. Beyond the frontiers, he could discover nothing but the ocean or desert land, inhabited by hostile Barbarians of rude manners and unknown language, by whom he might be seized, discovered, and brought back to an irritated master."

Had these gentlemen been sentenced to transportation, when America was the place of destination, if

they had fallen under a master naturally tyrannical, there might have been some relief from the example of those around him; a new situation, adequate to their merits, might have opened to have relieved them from their oppression, and if the system of municipal law wisely checked and prevented the means of revenge, still they would have found in the pursuit of knowledge, and in the society of men of letters, a refuge and solace from the miseries of their fate. But in the place to which they are now destined, they are to be the subjects of a military despotism, from which they cannot fly, but to the unfathomable ocean, or to desert land inhabited by tribes of barbarians, of rude manners and unknown language, by whom they might be seized and restored to an irritated master, and to the severity of martial law.

Such, Sir, is this aggravated species of transportation; a punishment not only disproportioned to the offence, but harsh and unnecessary, when it is considered with reference to the situation and character of the persons on whom it is pronounced.

Sir, I am not one of those, who think that crimes should be punished differently in the high and low, or that one species of punishment should be appropriated to one rank and condition in society, and another to another. But I conceive it to be a sound and unerring maxim of criminal jurisprudence, to make the prevention of crime the object and end of punishment. In exercising a discretion as to punishment, therefore, a court is bound to consider what will be adequate and effectual to the end of prevention, and never to exceed

exceed it. In that view of the subject a sound discretion necessarily includes the consideration of the rank, education, and condition of the party convicted. It is not a sound discretion which has recourse in all cases, without distinction, to the utmost grasp of that which the law may be supposed to permit: for the mind of man shudders at a disproportionate sentence, and feeling no respect for the administration of justice so strained, the hand of authority is weakened and palsied by the act. These principles and that maxim, especially when considered with a reference to the extreme harshness of these judgments, compared with those punishments which should have been the guide to its discretion, might have served to moderate the conduct of the court.

Sir, there were guides at hand, to which I think the judges were bound to have had recourse, as to sound and unerring rules of judgment.

In the first place, they might have looked at home, and referred to similar cases in the law of Scotland, in times when the memory of the act of 1703, was fresh in men's minds, in cases where the crimes punished were *Leasing-making*; and of that aggravated sort which insulted the Prince upon the throne, attacked the succession of the House of Brunswick, with a foreign enemy at our door, and a rebellion just ready to break out, or but recently quelled. They would then have found that the only punishments inflicted were fine and imprisonment.

If they had not chosen to follow the example of their Scots ancestors, they might have referred to
the

the mild but sufficient laws of England for their guide. There was every reason for following what the practice of England pointed out. In the first place, the legislature of both countries in an article of union, formally stipulated and agreed,* had expressed a clear opinion, that it would be wise to have matters of public law and police put upon the same footing in both countries. Where judicial discretion leaves much in the power of the judge, nobody can doubt that the court would have acted a wise and justifiable part, if in its judicial discretion it had leaned to that which the wisdom of our ancestors pointed out as wise and politic, for legislative regulation : especially when one branch of the law, respecting public crimes, or offences against the state or government (I mean the laws respecting treason) had been rendered the same in both countries, by a British statute extending the English law of treason to Scotland. Sir, there was besides this, another clear and solid principle, to dictate and suggest the analogy of the English laws, namely, that when subjects are bound by the same allegiance to the same prince and state, the rules of law which regulate that allegiance, and punish breaches of it, should be the same. That which applies to the higher, applies equally to the lower order of state crimes. Scotland is bound by the same moral and political duties, with regard to the safety of the constitution, and the welfare of society, as England. There is no duty which a person residing in England owes to his Prince,

* Eighteenth Article of Union.

which

which a person in Scotland does not equally owe to him; and he owes no other. Their duties are the same with regard to the legislature, for we live under the same legislative power. Every breach of duty by the one, is equally a breach of duty by the other. I have always been of opinion, therefore, that the laws should be assimilated and made conformable in the lesser *state offences*, as well as in treason. But if the legislature has not done so, still it would have been a just and sound guide for a judicial discretion to have referred to the punishment of such crimes in England; as it is evident that what would secure the state in one country, was likely to do so in the other: every obligation of political morality being virtually and mutually the same. With that index to point the way, how different ought the sentences to have been in these cases!

But if neither the example of Scots judicatures in former and similar cases, nor the daily practice of England, were thought fit and suitable guides for the discretion of the judges, still there remained another, by the analogy of which they might have been regulated. They might have had recourse to the example of the British legislature, in cases that were not supposed to fall within the ordinary course of the common or statute law; they would there have found, among many others, the case of Bishop Atterbury. They would have seen that * a horrid conspiracy had been entered

* These are the words of the preamble of the act of attainder, and ought to be compared with these indictments, to shew how Atterbury's crime exceeded them in enormity.

into against the reigning king, and that the Bishop of Rochester, notwithstanding the many solemn assurances, by him given, of faith and allegiance, had been deeply concerned in forming and directing the said wicked and detestable conspiracy, to procure a foreign force to invade and depose the reigning king, and overturn the constitution. For that crime, the act of attainder inflicts upon him the sentence of banishment (that is, expulsion from the realm) and he accordingly went to France. They might have compared the crime of Mr. Muir and Mr. Palmer with that of the Bishop of Rochester. Whatever heinousness, Alarm, and Apprehension may have attached to the former, there is nothing either in its nature, or in the character of the times, that raises it near to the pitch of the latter. Such, Sir, are the just guides for the direction of the court, but they were all rejected, and instead of them, recourse was had to the law of Rome under the dominion of the emperors, as a suitable and fit analogy for a criminal court in a free country. Sir, I quote, again, from the authority of Creech's account of the trial.* A learned judge in giving judgment says (and the authenticity of my quotation cannot be doubted, for the editor gives the Latin quotations from the Civilians with great accuracy, and they could only flow from the learned judge himself) " If
 " punishment, adequate to the crime of sedition were
 " to be sought for, it could not be found in our law ;
 " now *that torture* is happily abolished. The sole ob-
 " ject of punishment among us is only to deter others
 " from committing like crimes in time coming. In

* Page 127.

“ this view I concur in the transportation for fourteen
 “ years, *which is a mild punishment*, considering the
 “ offence, and the danger of the times; by the Ro-
 “ man law, which is held to be our common law
 “ where there is no statute, the punishment was va-
 “ rious, and transportation was among the mildest
 “ mentioned. Paulus, l. 38. Dig. de Pœnis, writes,
 “ *Actores Seditiois & tumultus populo concitato,*
 “ *pro qualitate dignitatis, aut in furcam tolluntur,*
 “ *aut bestiis obijciuntur, aut in insulam deportantur.*
 “ We have chosen the mildest of these punishments.”

The court then rejected the judgments of their an-
 cestors in 1715. They rejected the mild, equitable,
 but efficacious law of England. They rejected the
 dispensations of the legislature, as in the case of At-
 terbury; and instead of these rational and constitu-
 tional guides, suggested and enforced by being the
 laws of a free people, and tending to unite and keep
 in uniformity that system of obedience due by two
 nations, now united in one, bound by one allegiance,
 and obeying one legislature, they have had recourse
 to the tyranny of Rome, under the cruel and absolute
 dominion of Nero, Caligula, and Domitian; when,
 according to the sublime language of Gibbon, “ The
 “ Empire of the Romans filled the world, and being
 “ governed by a single man, the world became a se-
 “ cure but dreary prison for its inhabitants.”

Such, Sir, I am sorry to say, has been the mis-
 taken conduct of a British court of justice, looking
 for guides to direct them in the analogy of despotism
 and tyranny, where no analogy ought to be looked
 for;

for ; and disregarding that index which must have shewn them the right road to the true and genuine principles of criminal discretion. Such unprecedented severity, Sir, it is the bounden duty of the representatives of the people to avert ; it would be their duty upon the consideration of the question of discretion alone ; but if, in addition, there is doubt as to the legality of the sentences, and reason to think there was a *mis-trial*, there cannot be a difference of opinion about our duty and our conduct in this place.

Sir, I am at a loss to conceive what arguments can be brought to maintain a conclusion contrary to that for which I contend ; for such a conclusion as is as injurious to England, as it is disgraceful to Scotland. How can this part of the island be governed, if in the northern part of it the punishment for the same offence is so far to exceed all measure of severity known here ? It must either be admitted, that the laws of Scotland are cruel and tyrannical, or those of England weak and inefficacious. Sir, if this system is persevered in, I shall not be without suspicion that it is intended, though it dare not be avowed to introduce the rigours of transportation for state misdemeanors into the laws of the country.

Sir, I have now closed this grave, important, and interesting subject. I have shewn the legality of the sentences against Mr. Muir and Mr. Palmer to be questionable ; because the law does not authorise the punishment of transportation for such offences as they are charged with, in any view of the question. I have shewn, that in the case of Mr. Muir there was a *mis-*

trial, by the admission of objectionable jurymen, by the rejection of legal, and the admission of illegal evidence. But even if there was no doubt as to the *legality* or *mis-trial*, still I have shewn, that there has been an unsound and excessive exercise of the discretionary powers of the court, in adjudging these unprecedented punishments. Having done these things, I have closed my case.

Sir, I am very apprehensive that I have greatly fatigued your attention, and that of the House, but my apology must be, that the subject in every view of it called for a full examination. Sir, I should certainly conclude here, returning my most sincere and grateful thanks to you, and to the whole House, for the profound attention with which I have been honoured throughout so long and intricate a question, were it not that I owe it to myself, shortly, to explain the motives which have persuaded me to lay this most momentous subject before you.

As a professional man, I cannot wish it to be supposed that I have any over-weening disposition to bring the conduct of Judges into public discussion. As a Scotsman, I have no desire to hold out to public disapprobation the errors of that part of the country to which I belong, and to which I am most sincerely attached.

Sir, I have not been led to make these motions from the hope of professional advancement. For though what I have said on the present occasion does not, in any respect, relate to the courts in which my practice lies, yet, what I do upon this occasion, may be supposed to

to imply a general readiness to question judicial authority.

Sir, I have not been led to this measure from any personal disinclination to the characters of the learned persons who compose the Court of Justiciary. In that particular, my prejudices are all the other way; and I should be much more happy in an opportunity to praise, than I can be in an obligation to blame.

I cannot be influenced on this occasion by any personal partiality for Mr. Muir and Mr. Palmer, I have never seen them, I am totally unacquainted with them.

I have not been excited to take this step by an approbation of Paine's doctrines. My sentiments respecting the works of that person have been recently and openly declared in this House; and as a reward for my opinion, Mr. Paine has been pleased to animadvert, in a publication, upon what I then said, and to place me, to my surprise, in the company of the two right honourable gentlemen over against me.*

Sir, I have not been led to bring this business before you, from a desire of promoting a reform in the representation of the people in parliament. My opinion in opposition to such a plan, (notwithstanding my attachment to the respectable friends around me who support it) has been uniformly the same. It has been recently, publicly, and solemnly declared by me, in this House, to rest in a firm persuasion of the danger and inefficacy of such a measure. It was declared by me to be uninfluenced by the supposed spirit of the times, or by accidental circumstances; and I can venture to say,

* Mr. Pitt, and Mr. Dundas]

say, that, as my opinion has been maturely formed, so it will not be readily or rashly altered.

Sir, I have been induced to bring forward these questions, from a firm and decided conviction that the only means of preserving good order, and a due respect and obedience to government, is to take care that the law is dispensed in a spirit purely judicial; that the judgements of Courts of Justice proceed on legal authority, admissible evidence, and sound discretion; and that undue *stretches of law, lame or defective probations*, do not lead to excessive and unprecedented punishments.

Sir, I have been impelled to the agitation of this subject by the natural feelings of humanity and compassion, and that I may do all that is possible to ward off the public disgrace which invariably accompanies individual oppression.

I have been impelled to it, in order to prevent that greatest evil that can befall the community—the perversion of criminal jurisprudence in state crimes. An evil, which the history of every country, and every age, and above all the history of this island, might have taught us to avoid, as big with mischief. Without having recourse to ancient times, and other nations, from our own history, we may learn this important and impressive lesson, that JUDICIAL SEVERITY and PUBLIC DISCONTENT have never failed to accompany each other. Whether philosophers will consider them as cause and effect, I shall not stop to inquire; that they have been uniformly *co-existent* is enough to rouse a man of common observation to try to check the one, from an honest apprehension of the other.

Sir, I have been induced to bring these judgments under your view, because I am attached to the constitution of England, as by law established. Because I think the blessings we enjoy under it, are put in serious hazard by the judicial power pressing its authority, in doubtful questions, to the very edge and utmost grasp of its discretion.

Sir, it is not yet too late to prevent the mischief to which these judgments may give rise, and I must think that those who may be inclined to vindicate, to defend, and to excite such sentences, do not well consider the dangers they are about to encounter. "They embrace more than they can hold; they stir more than they can quiet; they fly to the end, without consideration of the means and degrees; they try *EXTREME REMEDIES at first*, and that which doubleth all errors, will neither acknowledge nor retract them."*

Sir, I ardently and sincerely wish to prevent the consequences of *extreme remedies* and unwise judicial severities; and I wish to accomplish my end in a way equally constitutional as it regards the subject, and respectful as it regards the King. I wish to engage, in this most interesting cause of humanity and justice, the most valuable privilege of the Commons, the right to approach the throne. I wish to persuade this House, the representatives of the whole nation, to address the Sovereign, calling upon him humbly but earnestly, to interpose his most favoured prerogative in behalf of these unfortunate gentlemen, and thus obtain for them the dispensations of MERCY: *That attribute of Heaven*

* Lord Bacon.

Heaven, which blesses him that gives, and those who ask.
 In this manner (by availing myself of my situation in this House, to open the only channel for redress, in a case where all legal appeal is precluded) I do all that an individual can do, to prevent the most serious and alarming injury that can happen to the law and the constitution. In that spirit, and with these impressions, I humbly move you, Sir,

That there be laid before this House, a copy of such parts of the books of adjournal or criminal records of the Court of Justiciary in Scotland, as contain the libel or indictment, the verdict and judgment, in the case of Thomas Muir, Esquire, Younger, of Huntershill, who was tried before the Court of Justiciary at Edinburgh, on the 30th and 31st days of August, 1793

Upon this first motion the House divided :

Ayes	—	—	171
Noes	—	—	32

Mr. Adam then made the following motions, all of which were negatived without a division :

That there be laid before this House, any minutes containing the objections made by the said Thomas Muir to the jury, or any of the jurors appointed to be the jury to try the said Thomas Muir on the 30th and 31st of August 1793, and the judgment or decision of the court on such objections.

That there be laid before this House the warrant or other instrument of commitment to prison, whereby one William Muir, a witness called by the prosecutor in the said prosecution, was committed to prison, or any minute whereby the cause and term of his commitment to prison appears.

That there be laid before this House, the warrant or other instrument of commitment to prison, whereby one John Russel, a witness called upon the part of the pannel

pannel (i. e. the defendant) Thomas Muir, in the said prosecution, was committed to prison, or any minute whereby the cause or term of his commitment to prison appears.

That there be laid before this House, any record or minute, whereby the evidence for or against the said Thomas Muir was admitted or rejected, and the grounds or reasons of such admission or rejection by the Court of Justiciary.

“ THAT an *humble address* be presented to his Majesty, humbly to express to his Majesty the peculiar satisfaction with which his Majesty's faithful Commons have always contemplated that security which his Majesty's subjects possess of applying, in the last resort, to his Majesty's justice and mercy.

His Majesty's faithful Commons beg leave to represent to his Majesty, that his royal clemency is called forth and exercised with peculiar propriety, in cases where there may be just reason to doubt either the strict legality, or the sound discretion which should always dictate the sentence of a court of justice.

That if within the limits of a British jurisdiction such a case shall have arisen, his Majesty's faithful Commons think it their bounden duty, humbly to call his Majesty's royal attention and consideration to it, that his Majesty may with that benignity which distinguishes his character, extend his mercy and justice to those who suffer under it.

His Majesty's faithful Commons, deeply impressed with these considerations, beg leave humbly to represent to his Majesty, that on the 30th and 31st of August 1793, Thomas Muir, Esquire, by the designation of Thomas Muir, Esquire, Younger, of Hunterhill, was tried before the high Court of Justiciary at Edinburgh, for certain crimes and offences, which by the law of England are denominated misdemeanors; that the said Thomas Muir being found guilty by the verdict of a jury, was sentenced and adjudged by the court to

be transported beyond seas for the term of fourteen years, and to suffer death, as in cases of felony, without benefit of clergy, if he should be found at large in Great Britain within the said term.

His Majesty's faithful Commons beg leave farther to represent to his Majesty, that the prosecution against the said Thomas Muir did originate in the said high Court of Justiciary, which is the highest court of criminal judicature in that part of Great Britain called Scotland; and they beg leave further humbly to represent, that it has been determined by the House of Lords, in its judicial capacity, that there can be no review by any superior tribunal of the judgments or sentences of the said court.

That his Majesty's faithful Commons, having taken the circumstances here set forth, and the case of the said Thomas Muir into their most serious consideration, beg leave humbly, but earnestly, to represent to his Majesty, that great and serious doubts have been excited by the proceedings and sentence in the said case, touching the legality of the same, and that such doubts have extended themselves, and do still exist in the minds of his Majesty's faithful Commons. That the crime for which the said Thomas Muir was indicted, and of which he is found guilty, is a crime known in the law of Scotland, under the appellation of *Leasing-making*, which crime of *Leasing-making* is defined and understood in the law of that country, to be uttering words or publishing matter tending to breed discord between the king and his people; that, by a statute passed in the parliament of Scotland in the fourth year of the reign of Queen Anne, intituled, "An act anent, concerning *Leasing-making* and Slanderers," it is enacted, "that whereas the crimes therein mentioned" (meaning the crimes mentioned in certain recited acts of parliament against *Leasing-making*) "are made capital and punishable by death and confiscation, and that the said laws have been liable to stretches,"
" and

“ and that in respect of the generality, and the various
 “ constructions which the same may admit, they may
 “ be, as to the aforesaid capital punishment of danger-
 “ ous consequence, doth therefore, with advice and
 “ consent of the estates of parliament, abrogate and
 “ annul in all time coming, the foresaid sanction and
 “ pain of death and confiscation contained in the said
 “ act; and statutes and ordains that the punishment of
 “ the crimes therein-mentioned shall, for hereafter
 “ only, be arbitrary according to the demerit of the
 “ transgressor, that is, by fining, imprisonment, or
 “ banishment; if the party offender be poor, and not
 “ able to pay a fine, then to be punished in his body,
 “ life and limb always preserved.”

Yet the said court, in respect of the verdict against the said Thomas Muir, ordered and adjudged, “ The
 “ said Thomas Muir to be transported beyond seas, to
 “ such place as his Majesty, with the advice of his
 “ privy council, shall declare and appoint, and that
 “ for the space of fourteen years from that date; with
 “ certification to him, if after being transported he
 “ shall return to, and be found at large within any
 “ part of Great Britain, during the said fourteen years,
 “ without some lawful cause, and be thereof lawfully
 “ convicted, he shall suffer death, as in cases of felony,
 “ without benefit of clergy, by the law of England.”

His Majesty's faithful Commons beg leave humbly to represent, that the punishment inflicted by the said sentence on the said Thomas Muir, seems to them greatly to exceed in severity, that which is appropriated to his offence by the above-mentioned statute of Queen Anne, inasmuch as the sentence inflicts the punishment of transportation, and that for a period of fourteen years, with certification of death if he returns; while the statute annuls the pain of death, and substitutes that of fining, imprisonment, or banishment, under which term of banishment a sentence of transportation cannot be lawfully included.

His Majesty's faithful Commons beg leave farther humbly to represent, that great public mischief and private oppression, being the necessary result of all such stretches of penal law, it became the duty of his Majesty's faithful Commons, humbly to represent the same to his Majesty, that his Majesty may, in his wisdom and justice, avert the evils likely to arise therefrom.

His Majesty's faithful Commons beg leave farther humbly to entreat his Majesty to extend his royal clemency to the said Thomas Muir, in as far as it can be made to appear, that a greater latitude of proof was admitted against the said Thomas Muir, under the general allegation of his being guilty art and part (by which is meant, guilty as accessory to the crimes charged) than is warranted under the operation of the statute of the parliament of Scotland, in the year 1592, intituled, "An Act concerning the relevancie of libelles in cases criminal," or can be justified upon any sound principle of jurisprudence.

His Majesty's faithful Commons beg leave farther humbly to beseech his Majesty to extend his royal clemency to the said Thomas Muir, in as far as it can be made to appear, that there were grounds of challenge, which may be deemed legal, proposed to all or some of the jurors, nominated and appointed to try the said Thomas Muir, which grounds of challenge were overruled by the said Court of Justiciary.

His Majesty's faithful Commons beg leave farther humbly to entreat his Majesty to extend his royal clemency to the said Thomas Muir, inasmuch as it can be made to appear, that a person of the name of William Muir, a witness summoned for the prosecution, was committed to gaol for having refused, upon a conscientious and religious scruple to take the oath; and was told by the prosecutor, as well as by the court, that perpetual imprisonment must be the consequence, if he should persevere in his objection.

His

His Majesty's faithful Commons beg leave farther humbly to entreat his Majesty to extend his royal clemency to the said Thomas Muir, inasmuch as it can be made to appear, that a person of the name of John Russell, a witness called by the said Thomas Muir in his defence, was committed for supposed prevarication, in putting to him the questions usually put to witnesses in Scotland, previous to their being examined, and the possible benefit of his evidence refused to the said Thomas Muir, by not submitting it to the consideration of the jury, who are alone competent to judge of the credibility of witnesses, and reserving to the conclusion of his examination any punishment or animadversion, that his conduct or demeanor as a witness might deserve.

And his Majesty's faithful Commons beg leave farther humbly to represent to his Majesty, that independent of the preceding considerations, there are strong reasons to induce his Majesty to extend his royal clemency to the said Thomas Muir; because, even if the law of Scotland vested the judges with the discretion of passing the judgment which they have pronounced, that judgment seems to his Majesty's faithful Commons, upon a due consideration and comparison of similar cases, to exceed the bounds of that sound discretion which all courts of justice ought to exercise, in discharge of that most important part of their duty, the infliction of arbitrary punishments; inasmuch as the punishment of transportation for fourteen years, with certification of death if the party should return, appears to be greatly disproportioned to the offence, which amounts only to a misdemeanor, and is greatly aggravated by the humiliating circumstances attending the transportation to the place to which the said Thomas Muir is to be sent, and the misery with which his residence there must be attended.

His Majesty's faithful Commons beg leave humbly to represent to his Majesty, that the law of England admits of no such punishment as transportation for such
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an offence, the ordinary punishment of which is fine or imprisonment; and that it may be attended with very pernicious consequences, to have one measure of punishment for crimes against the state or government in one part of the island, and another in the other, whilst the same executive and legislative government extend equally to both; and his Majesty's faithful Commons beg leave humbly to represent, that in the consideration of the punishment of such crimes, the measure of punishment in England might have formed a sound and unerring guide for the decision of the Court of Justiciary in the exercise of their discretion.

That his Majesty's faithful Commons, under the circumstances here represented, have recourse to the royal lenity, to secure efficacy to the law of England, and to mitigate the severity of that of Scotland.

Under these impressions, his Majesty's faithful Commons do most earnestly implore his Majesty to take into his royal deliberation, the various representations herein humbly set forth; and in consideration thereof, graciously to exercise his royal mercy towards the said Thomas Muir, by relieving him from the severity of the sentence under which he now labours.

That there be laid before this House, a copy of such parts of the books of adjournal or criminal records of the circuit court of Perth, in Scotland, as contain the libel or indictment, the verdict and judgment in the case of the Reverend Thomas Fyfe Palmer, who was tried before the said circuit court of Perth, on the 12th and 13th days of September 1793;

It passed in the negative.

That an humble address be presented to his Majesty, humbly to express to his Majesty the peculiar satisfaction with which his Majesty's faithful Commons have always contemplated that security which his Majesty's subjects possess of applying in the last resort to his Majesty's justice and mercy.

His Majesty's faithful Commons beg leave to represent to his Majesty, that his royal clemency is called forth

forth and exercised with peculiar propriety, in cases where there may be just reason to doubt, either the strict legality, or the sound discretion which should always dictate the sentence of a court of justice.

That if within the limits of British jurisdiction, such a case shall have arisen, his Majesty's faithful Commons think it their bounden duty humbly to call his Majesty's royal attention and consideration to it, that his Majesty may with that benignity which distinguishes his character, extend his mercy and justice to those who suffer under it.

His Majesty's faithful Commons deeply impressed with these considerations, beg leave humbly to represent to his Majesty, that on the 12th and 13th of September 1793, the Reverend Thomas Fyshe Palmer was tried before the circuit court at Perth, for certain crimes and offences, corresponding to those crimes and offences, which by the law of England are denominated misdemeanors: That the said Thomas Fyshe Palmer, being found guilty by the verdict of a jury, was sentenced and adjudged by the court to be transported beyond seas for the term of fourteen years, and to suffer death, as in cases of felony, without benefit of clergy, if he should be found at large in Great Britain within the said term.

His Majesty's faithful Commons beg leave farther to represent to his Majesty, that the prosecution against Thomas Fyshe Palmer did originate in the said circuit Court of Justiciary, which is a supreme court of criminal judicature in that part of Great Britain called Scotland; and they beg leave farther humbly to represent, that it has been determined by the House of Lords, in its judicial capacity, that there can be no review by any superior tribunal of the judgments or sentences of the said court.

That his Majesty's faithful Commons, having taken the circumstances here set forth, and the case of the said Thomas Fyshe Palmer, into their most serious consideration,

deration, beg leave humbly but earnestly, to represent to his Majesty, that great and serious doubts have been excited, by the proceedings and sentence in the said cause, touching the legality of the same, and that such doubts have extended themselves, and do still exist, in the minds of his Majesty's faithful Commons. That the crime for which the said Thomas Fyshe Palmer was indicted, and of which he was found guilty, is a crime known in the law of Scotland, under the appellation of *Leasing-making*, which crime of *Leasing-making* is defined and understood in the law of that country, to be uttering words or publishing matter, tending to breed discord between the king and his people: that by a statute passed in the parliament of Scotland in the 4th year of the reign of Queen Anne, intituled, "An Act anent, concerning *Leasing-making* and slanders," it is enacted, "that whereas the crimes therein mentioned," (meaning the crimes therein mentioned in certain recited acts of parliament against *Leasing-making*) "are made capital and punishable by death and confiscation, and that the said laws have been liable to stretches, and that in respect of the generality, and the various constructions which the same may admit, they may be, as to the aforesaid capital punishment, of consequence; doth therefore, with advice and consent of the estates of parliament, abrogate and annul, in all time coming, the aforesaid sanction and pain of death and confiscation contained in the said act: and statutes and ordains, that the punishment of the crimes therein mentioned, shall for hereafter only be arbitrary, according to the demerit of the transgressor, that is, by fining, imprisonment, or banishment; if the party offender be poor, and not able to pay a fine, then to be punished in his body, life and limb always preserved."

Yet the said court, in respect of the verdict against the said Thomas Fyshe Palmer, ordered and adjudged, "the said Thomas Fyshe Palmer be transported beyond

“ yond seas, to such place as his Majesty, with the
 “ advice of his privy council, shall declare and appoint,
 “ and that for the space of seven years from that date;
 “ with certification to him, if after being transported,
 “ he shall return to, and be found at large within any
 “ part of Great Britain, during the said fourteen years,
 “ without some lawful cause, and be thereof lawfully
 “ convicted, he shall suffer death, as in cases of felony,
 “ without benefit of clergy, by the law of England.”

His Majesty's faithful Commons beg leave humbly to represent, that the punishment inflicted by the said sentence on the said Thomas Fyshe Palmer, seems to them greatly to exceed in severity, that which is appropriated to his offence by the above-mentioned statute of Queen Anne, inasmuch as the sentence inflicts the punishment of transportation, and that for a period of seven years, with certification of death if he returns; while the statute annuls the pain of death, and substitutes that of fining, imprisonment, and banishment, under which term of banishment a sentence of transportation cannot be lawfully included.

His Majesty's faithful Commons beg leave farther humbly to represent, that great public mischief and private oppression being the necessary result of all such stretches of penal law, it became the duty of his Majesty's faithful Commons humbly to represent the same to his Majesty, that his Majesty may, in his wisdom and justice, avert the evils likely to arise therefrom,

And his Majesty's faithful Commons beg leave further humbly to represent to his Majesty, that independent of the preceding consideration, there are strong reasons to induce his Majesty to extend his royal clemency to the said Thomas Fyshe Palmer; because, even if the law of Scotland vested the judges with the discretion of passing the judgment which they have pronounced, that judgment seems to his Majesty's faithful Commons, upon a due consideration and comparison of similar cases, to exceed the bounds of that sound discretion, which all courts of justice ought

to exercise in discharge of that most important part of their duty, the infliction of arbitrary punishment; inasmuch as the punishment of transportation for seven years, with certification of death, if the party should return, appears to be greatly disproportioned to the offence, which amounts only to a misdemeanor, and is greatly aggravated by the humiliating circumstances attending the transportation to the place to which the said Thomas Fyshe Palmer is to be sent, and the misery with which his residence there must be attended.

His Majesty's faithful Commons beg leave humbly to represent to his Majesty, that the law of England admits of no such punishment as transportation for such an offence, the ordinary punishment of which is fine or imprisonment; and that it may be attended with very pernicious consequences, to have one measure of punishment for crimes against the state of government in one part of the island, and another in the other, whilst the same executive and legislative government extends equally to both: and his Majesty's faithful Commons beg leave humbly to represent, that in the consideration of the punishment of such crimes, the measure of punishment in England might have formed a sound and unerring guide for the decision of the Court of Justiciary in the exercise of their discretion.

That his Majesty's faithful Commons, under the circumstances here represented, can only have recourse to the royal lenity and justice to secure efficacy to the law of England, and to mitigate the severity of that of Scotland.

Under these impressions, his Majesty's faithful Commons do most earnestly implore his majesty to take into his royal deliberation the various matters herein humbly set forth; and in consideration thereof, graciously to exercise his royal mercy towards the said Thomas Fyshe Palmer, by relieving him from the severity of the sentence under which he now labours.

APPENDIX.

APPENDIX.

SCOTS ACTS, VOL. III. ANNE 1703, C. 3.

*Act ratifying the turning the Meeting of Estates,
in the Year 1689, into a Parliament.*

OUR Sovereign Lady; with advice and consent of the estates of parliament; ratifies, approves, and perpetually confirms the act of King William and Queen Mary's parliament, dated the fifth of June, one thousand six hundred and eighty-nine, intituled, Act declaring the meeting of the estates to be a parliament; and of new enacts and declares, that the three estates then met together the said fifth of June, one thousand six hundred and eighty-nine, consisting of noblemen, barons, and borroughs, were a lawful and free parliament; and it is declared, that it shall be high treason for any person to besown, quarrel, or impugn the dignity and authority of the said parliament; and further, the Queen's Majesty, with consent foresaid, statutes and declares, that it shall be high treason in any of the subjects of this kingdom, to quarrel, impugn, or endeavour by writing, malicious and advised speaking, or other open act or deed, to alter or innovate the claim of right, or any article thereof.

1703, C. 4. *Act anent Leasing-makers and Slanderers.*

OUR Sovereign Lady, considering, that by the acts of parliament following; viz. The Act James I. Parliament the 2d, C. 43, intituled, *Leasing-makers*, tines life, and goods. Act James V. Parliament 6th, C. 83, of *Leasing-makers*. Act James VI. Parliament 8th, C. 134, anent *Slanderers* of the King, his Progenitors and Realm. Act James VI. Parliament 10th, C. 10, intituled, *Authors of Slanderous Papers or Writs*, should be punished to the Death. Act

James VI parliament 14. c. 209, anent Leasing-makers, and authors of slanders. And Act James VI. parliament 20, c. 9,* intituled, Act against scandalous speeches and libels. The crimes therein mentioned are made capital and punishable by death and confiscation: and that the said laws have been liable to stretches, and that in respect to their generality, and the various construction which the same may admit, they may be, as to the aforesaid capital punishment, of dangerous consequence, doth therefore, with advice and consent of the estates of parliament, abrogate and discharge in all time coming, the foresaid sanction and pain of death and confiscation, contained in the said acts, and statutes, and ordains, that the punishment of the crimes therein mentioned, shall for hereafter only be arbitrary, according to the demerit of the transgression, that is, by fining, imprisonment, or banishment; or if the party offender be poor, and not able to pay a fine, then to be punished in his body, (life and limb always preserved.

Stat. Rob. 2. c. as the punishment of homicide where the criminal does not appear, the words are, "sit perpetuo ban-nitus et exsul."

1449. c. 22. i. 2. parl. 6.—As the punishment of forners and vagabonds, the words are "banished the country."

1457. c. 79. i. 2. parl. 14.—Relative to the same description of people, the words are "either banish them the country " or send them to the king's prison."

1494. c. 53. i. 4. parl. 5.—As the punishment of persons passing forth of the kingdom to purchase benefices, the words are, "shall incur the pains of proscription, rebellion, banishing and putting them to our Sn. Lord's Horn."

1540. c. 118. i. 5. parl. 7.—As the punishment of burners of corn, raisers of fire, and ravishers of women, the words are, "to be justified to the death, or else banished the "realm for ever."

* This the act quoted in the speech, under the title of the act 1609.

Banishment is mentioned in the following statutes :

1567. c. 2. i. 6. parl. 1.—Abolishing the pope's authority, and that none of our soveranies subjects scite or desire title or rucht of the bishop of Rome, under the pain of baratry, "that is to say, proscription, *banishment*, and never to "brueick honor &c. within the realm."

1581. c. 106. i. 6. parl. 7.—Against fugitives and other papists practising against the true religion, the words are, "shall incur the pain of *banishment*, and confiscation of moveables."

1587. c. 110. i. 6. parl. 11.—Against the sellers of goods pertaining to manufacturers, the words are, "shall incur the "pain of *banishment* and confiscation of all their goods moveable."

1609. c. 9. i. 6. parl. 20.—Against scandalous speeches, and libels against the people of England, the words are, "shall "be severely punished in their persons and goods, by imprisonment, *banishment*, fining or *mair rigorous corporal pain*."

1661. c. 34. Charles II. parl. 1.—Against clandestine marriages, the words are, "the celebrators of such marriages be "*banished* the kingdom, *never to return therein*."

1696. c. 35. William 6. Sef. parl. 1.—Against duels, the words are, "shall be punished by the pain of *banishment*."

1696. c. 5. William 6. Sef. parl. 1.—Act for declaring notour bankrupts, "to be held infamous, and also be punished by *banishment* or otherwise (*death excepted*.)"

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